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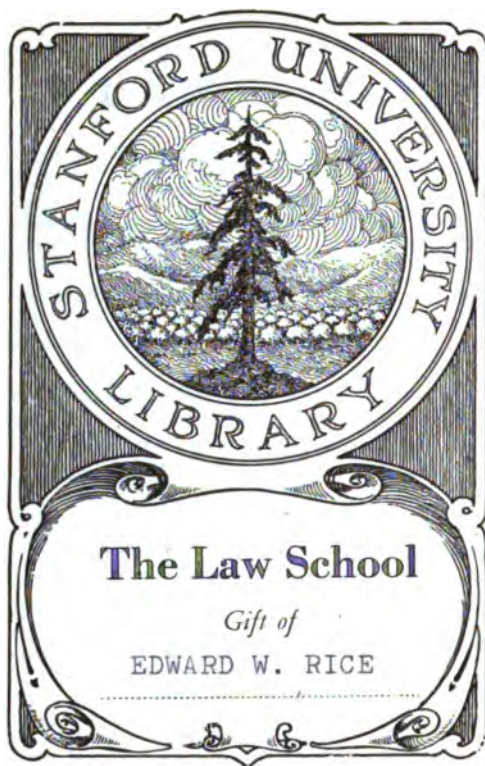
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NOTES AND COMMENTARIES

ON THE

SALE OF GOODS ACT 1893

Printed by R. & R. CLARK, LIMITED

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NOTES AND COMMENTARIES
ON THE
SALE OF GOODS ACT 1893

[56 & 57 VICT. CH. 71]

WITH
SPECIAL REFERENCE TO THE LAW OF
SCOTLAND

BY
RICHARD BROWN

MEMBER OF THE FACULTY OF PROCURATORS, GLASGOW; PROFESSOR OF
MERCANTILE LAW, ST. MUNGO'S COLLEGE, GLASGOW

EDINBURGH
WILLIAM GREEN AND SONS

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1895



INTRODUCTORY NOTE.

SINCE the Sale of Goods Act became law two excellent works have appeared explaining its provisions—one by Judge Chalmers of Birmingham, the draftsman of the measure; the other, a more extended work, by Messrs. Ker and Pearson-Gee. These set forth the law of sale in England as codified with only trifling alterations in the Act; but neither of them professes to deal, except incidentally, with the law of Scotland, or makes any attempt to explain the important and almost revolutionary changes made by the Act upon the principles and practice of the Scottish law of sale. As I had the honour, while the bill was passing through Parliament, to be associated to some extent with the learned draftsman in an endeavour to adapt the measure to Scottish requirements, I have since felt it my duty to follow up these efforts by an explanation of the bearing of the Act upon Scottish law.

Another reason for the present publication is, that apart from statutory change, there seemed a distinct call for a modern treatise on the subject of sale in Scotland. The only Scottish work on sale was that of Mr. M. P. Brown, published in 1821, which, notwithstanding its general excellence, necessarily failed to throw light on many important and intricate questions. It can scarcely be claimed for the little work of Professor Bell, published posthumously

in 1844, that it added anything of importance to the Scottish aspect of the law of sale, or that it now adequately represents the law either of Scotland or England.

Instead of summarising here the changes made by the Act upon the law of Scotland, or the differences still existing between the law of sale in England and Scotland, I have noted these changes and differences under separate headings in the General Index.

The English law of sale has been enriched by the treatises of Lord Blackburn and Mr. Benjamin, both of which have been freely used in the preparation of this work. The citations from Blackburn refer to the second edition, and those from Benjamin to the fourth edition.

RICHARD BROWN.

138 WEST GEORGE STREET,
GLASGOW, *June* 1895.

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Young v. Loudoun (1855), 322.
Young v. Stein's Creditors (1789), 334.

Z

- *ZAGURY v. Furnell (1809), 94.

SALE OF GOODS ACT 1893.

[56 & 57 VICT. c. 71.]

An Act for codifying the Law relating to the Sale of Goods.

[20th February 1894.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

PART I.

FORMATION OF THE CONTRACT.

Contract of Sale.

1.—(1.) A contract of sale^(a) of goods^(b) is a contract whereby the seller^(c) transfers or agrees to transfer the property^(d) in goods to the buyer^(e) for a money consideration, called the price.^(f) There may be a contract of sale between one part owner and another.^(g)

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TO SELL.

(2.) A contract of sale may be absolute or conditional.^(h)

(3.) Where under a contract of sale the property in the goods is transferred from the seller to the buyer⁽ⁱ⁾ the contract is called a sale ; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.^(j)

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(4.) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.⁽⁴⁾

NOTES.

(a) “‘*Contract of sale*’ includes an agreement to sell as well as a sale,” and “‘*sale*’ includes a bargain and sale as well as a sale and delivery” [Sect. 62 (1)]. “Bargain and sale” (sometimes called “executed sale”) is to be distinguished on the one hand from “agreement to sell,” and on the other hand from “sale and delivery.” “Bargain and sale,” though unaccompanied by delivery, may pass the property to the purchaser, but if delivery has followed, it becomes “sale and delivery.” The distinction between “sale” (i.e. “bargain and sale”) and “agreement to sell” is noticed below. COM. *infra*, p. 4.

(b) “‘*Goods*’ include . . . all corporeal moveables except money” [Sect. 62 (1)].

(c) “*Seller*”—“*Buyer*.” See definitions, Sect. 62 (1).

(d) “‘*Property*’ means the general property in goods, and not merely a special property” [Sect. 62 (1)]. The terms “general” and “special” as applied to property are now introduced for the first time into the law of Scotland. COM. *infra*, p. 5.

(e) *Price*. See Sections 8 and 9.

(f) *Part owners*. In Scotland it has never been doubted that one part owner may sell his interest to another, but the English law of co-ownership rests on an unsatisfactory basis. The difficulty perhaps arises from the extreme development in English law of the principle that one cannot contract with himself, a theory which frequently leads to injustice, especially in connection with trusts and partnership.—See Lindley on *Partnership*, 6th ed. p. 31 *et seq.*

(g) The contract may be conditional in itself, or it may include a condition as one of its terms. The distinction is important. See COM. *infra*, p. 7.

(h) “*Transferred from the seller to the buyer*.” In England, and now also in Scotland, there is a re-transfer of the property in certain cases from the buyer to the seller, as where the buyer recovers damages for non-delivery under Sect. 51. See COM., Sect. 43 *post*, p. 201.

(i) *E.g.* in Section 18, Rule 1 refers to “sale,” and Rules 2 and 3 to “agreement to sell.” Under Rules 4 and 5 an “agreement to sell” becomes a “sale.”

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General characteristics of sale.

Variations of legal principles and terminology.

Differences between the law of England and Scotland as to transfer of property.

Sale as a contract has the same general characteristics in every system of jurisprudence. The transfer of the absolute or general¹ property distinguishes it from the contracts of loan, hire,² carriage or other bailment, while the money consideration or price distinguishes it from donation and exchange or barter.³ But the legal principles involved vary in different countries, and the terminology employed often differs in its application. Thus the definition of sale given in this section does not describe the contract as it existed in the law of Scotland before the passing of this Act. In Scotland the seller did not *transfer* the property by the contract; he only *agreed* to transfer it. The contract formed the sale, but its effect was merely to give a *titulus transferendi dominii*; it did not operate as a conveyance in the buyer's favour. The contract was personal between the seller and the buyer, giving the latter in the case of the sale of a specific article a *jus ad rem specificam*, but no *jus in re*.⁴ The seller remained the owner of the goods until delivery, and he might therefore validly sell the same goods to a second buyer transacting with him *bona fide* and obtaining delivery. In this case the second buyer's right could not have been called in question by the original buyer, whose only remedy was a personal action against the seller for damages for breach of contract. Again, prior to the Mercantile Law Amendment Act, Scotland, 1856,⁵ the seller's creditors could seize goods sold but not delivered, and were not bound to recognise any right in the buyer.⁶ The principle of the law of England,

¹ The term "general property" explained *infra*, p. 5.

² A contract for the supply of steam power is sale, not lease—*Clark v. Stewart* (1872), 10 S.L.R. 152. In *Ferguson v. Fyfe* (1868), 6 S.L.R. 68, it was doubted whether a contract as to turnips to be consumed by sheep in the field where grown, constituted a sale of the turnips or a lease of the land.

³ The distinctions here referred to relate primarily to the *subject* of the contract. Other distinctions affect the parties or the mode, e.g. a sale by a principal or by an agent or a sale of material combined with the services of an artificer or workman. As to sale conjoined with *locatio operarum*, see Bell's *Com.* i. 193, 194.

⁴ "Property or dominion passes not by conditions or provisions, but by tradition and other ways prescribed in law."—Stair, i. 14. 5.

⁵ 19 & 20 Vict. c. 60.

⁶ "Until possession was given to the purchaser, the seller's trustee had the

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to which the law of Scotland is now assimilated, is set forth in this section, and in Sections 17 and 18. In a sale of specific goods in a "deliverable state,"¹ the seller (where there are no special conditions) transfers the property to the buyer by the mere force of the contract irrespective of delivery. This is called a "sale" as distinguished from an "agreement to sell," which, as defined in this section, refers to a transfer of the property at some future time. The phrase "agreement to sell," is generally applied to what is known as an "executory sale," i.e. where the seller undertakes to manufacture or procure the goods and to deliver them at a future time, or where the goods are not in a "deliverable state" or require to be weighed, measured, or tested.² A sale as distinguished from an "agreement to sell" is also known in English law as a "bargain and sale."

Scottish criticisms upon the English rule.

We are thus met at the threshold of the Act by an important change in the law of Scotland. The principles now imported from England have been adversely criticised by many of our judges and text-writers, and have been unfavourably contrasted with the Scottish rules now supplanted.³ There is probably truth in much of this criticism, but in balancing expediency our legislators have deemed it better to assimilate the law, even at the sacrifice of more logical and better defined principles.⁴

English terms not clearly understood in Scotland.

It is to be noted, however, that the English rule as to the transfer of the property in goods sold but not delivered has not been clearly understood even by those of our standard Scottish text-writers who have undertaken to contrast the two systems. Thus Mr. Mungo P. Brown, whose work on *Sale*, published in 1821, was justly characterised by Lord President Inglis as a "scientific treatise" by "a very

option either of enforcing the contract against him or of taking the thing sold, leaving the purchaser to rank for a dividend upon the amount of loss he sustained by non-fulfilment of the contract."—Per Lord Watson in *Seath and Co. v. Moore* (1886), 13 Ret. H.L. 57 at p. 64.

¹ "Deliverable state" is defined in Sect. 62 (4).

² See Sect. 18, Rules 2 to 5.

³ E.g. by Lord President Inglis in *Anderson v. McCall* (1866), 4 Macp. at p. 770; by Lord Jus.-Clk. Moncreiff in *Gardiner v. McLeavy* (1880), 7 Ret. at p. 612; and *Fleming v. Smith* (1881), 8 Ret. at p. 548; and by Sheriff Guthrie in *Spencer and Co. v. Dobie and Co.* (1879), 7 Ret. at p. 396.

⁴ See further as to transfer of the property, Com., Sect. 17 *post*, p. 80.

high authority on this branch of the law,"¹ enters into an explanation of the English use of the terms "absolute property" and "special property"² in order to show that the buyer's right in undelivered goods is not "absolute" but "special."³ To some extent this error is due to the uncertainty which long existed in England as to the exact nature of "vendor's lien,"⁴ but nothing could be further from the truth than to speak of the buyer's property in goods still in the custody of the seller as "special."⁵ All modern English authorities describe sale as "a transfer of the absolute or general property."⁶ "A transfer of the special property is not a sale of the thing,"⁷ and accordingly the Act specially defines "property" as "the general property in goods and not merely a special property."⁸ Professor Bell, both in his *Principles* and his *Commentaries*, falls into the same error.⁹ "In England," he says, "the completion of the mere contract is said to pass the property. But it is not the *absolute* property which so passes: it is only a qualified and imperfect right which subjects the buyer to the risk of the commodity, but confers on him no title to demand possession of it or to exercise any dominion over it; and it therefore cannot be said that the property passes otherwise than nominally, until the contract is followed by delivery and possession." This statement, except in so far as it refers to the risk, does not represent the English law which we are now called upon to observe and administer in Scotland. But it is only fair to Professor Bell to observe that in his little

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Absolute or general property and special property.

¹ In *Murdoch and Co., Ltd., v. Greig* (1889), 16 Ret. 396 at p. 401. Professor Bell also held M. P. Brown's work in high estimation.—Bell's *Com.* i. 458, note. ² M. P. Brown on *Sale*, pp. 5, 6. ³ *Ibid.* pp. 6, 21.

⁴ "The extent of the unpaid vendor's right whilst he is in possession of the goods is one on which the law is more unsettled than any person not practically acquainted with the subject could anticipate."—Blackburn on *Sale*, 2nd ed. p. 445.

⁵ "Special property" as a legal phrase narrowly escaped being introduced into Scotland in 1770 through a House of Lords judgment in a Scotch appeal.—See *Hastie and Jamieson v. Arthur* (1770), Mor. 14209. In this case the words were used in their proper sense.

⁶ *E.g.* Benjamin, p. 1; Story, Sect. 1. The word "property" used without qualification means "general property." See Blackburn on *Sale*, 2nd ed., Intro. ix. and p. 123 *et seq.*; Campbell on *Sale of Goods*, 2nd ed. p. 38 *et seq.*

⁷ Benjamin, p. 2.

⁸ Sect. 62 (1).

⁹ Bell's *Prin.*, Sect. 86, note; Bell's *Com.* i. pp. 176, 177, and note, p. 177.

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work on *Sale*, prepared at the close of his life and published after his death, he states the law of England accurately as follows :—"Where delivery is not made, but, at the request of the buyer or for the convenience of the parties, the thing sold is left with the seller, the property is passed; and the seller is a mere custodier for the buyer, with a lien for the price."¹

Memorandum
prefixed to
bill.

The memorandum prefixed to the bill while before the House of Lords in 1891 and 1892 stated the distinction between the laws of England and Scotland thus :—"In England the property in goods passes under a contract of sale as soon as the parties intend it to pass whether the goods be delivered or not. In Scotland the rule of the civil law prevails, and the property in goods sold does not pass until delivery. It has, however, been pointed out by Lord Blackburn that since the 19 & 20 Vict. c. 60, Sect. 1" (the Mercantile Law Amendment Act, Scotland, 1856), "this distinction is not of much importance, for whenever the property would pass in England the buyer in Scotland acquires a *jus ad rem*, though not a *jus in re*. The goods are at the buyer's risk, and the seller's creditors cannot attach them." This statement is not quite accurate in so far as it implies that the buyer's risk was a consequence of the Mercantile Law Amendment Act. The separation of the risk from the property was established in Scotland at least as far back as the seventeenth century, the rule being that, as soon as the contract was complete, specific goods were at the risk of the buyer, though undelivered and though no property had passed.²

Mercantile
Law Amend-
ment Act 1856.

Buyer's risk.

Further, it would seem that Lord Blackburn, in the case referred to in the memorandum,³ over-stated the effect of the Mercantile Law Amendment Act in producing assimilation.⁴ That Act did not touch the seller's right in Scotland

Seller's powers.

¹ Bell on *Sale* (1844), p. 15.

² But the rule as to risk was not quite fixed in the time of Stair (1681), who debates both sides of the question with an evident preference for continuing the risk with the ownership.—Stair, *Inst.* i. 14. 7.

³ *M'Bain v. Wallace and Co.* (1881), 8 Ret. H.L. 106.

⁴ Lord Blackburn said :—"There is a nominal difference still between the law of England and the law of Scotland, but for all practical purposes the law of Scotland, where there has been a contract of sale though no delivery, is made identical with the law of England in the actual result."—8 Ret. H.L. at p. 112.

to retain for a general balance due by a bankrupt purchaser,¹ Sect. 1. nor did it prevent a fraudulent buyer from selling the same goods to two successive sub-purchasers, and giving a good title to the second with delivery, to the exclusion of the first without delivery. The provisions of the Act applied only to a limited class of cases, and even within these limits its application was beset with difficulties.² One of the effects of the extension of the English rule to Scotland is to abolish the special and cumbrous machinery of the Mercantile Law Amendment Act, and to completely assimilate the law in the matter of passing the property.³

In reference to the provision that "a contract of sale may be absolute or conditional," it is to be observed that "condition" has a wider meaning in this section than in any other part of the Act. It includes not merely a promissory condition to be performed by one of the parties as in Sect. 11, but also a casual or contingent condition which may go to the root of the contract itself. In the former case non-fulfilment of the condition frees the other party from his reciprocal obligation, and may also involve liability for damages; in the latter it may depend upon the fulfilment of the condition whether the contract is binding upon one of the parties or is altogether void.⁴ Pothier's division of conditions into potestative, casual and mixed,⁵ applies to unilateral obligations rather than to mutual contracts, and does not adequately represent the distinction referred to. It is better expressed in the Indian Contract Act, which deals separately with "contingent contracts"⁶ and "promises"⁷ or "reciprocal promises."⁸

Conditional sales.

¹ *Mein v. Bogle* (1828), 6 Sh. 360. See Sheriff Glassford Bell's note to his interlocutor in *Wyper v. Harveys* (1861), 23 D. 606 at p. 609.

² See *a.g. Wyper v. Harveys* (1861), 23 D. 606.

³ See also Com., Sect. 17 *post*, p. 80.

⁴ The distinction is well illustrated by *Philip v. Edinburgh, Perth, and Dundee Railway Co.* (1854), 16 D. 1065. Rev. on app., H.L. (1857) 2 Macq. 514. In the Court of Session the condition was treated as potestative on the part of the purchasers, and they were consequently held bound in specific implement; in the House of Lords the contract itself was held to be conditional, and both parties were therefore free. See further on this subject, Com., Sect. 10 *post*, p. 45.

⁵ Oblig., Sect. 201 (adopted by Bell—*Prin.*, Sect. 50).

⁶ Sect. 31 *et seq.*

⁷ Sect. 51 *et seq.*

⁸ Sect. 37 *et seq.*

Sect. 2.
CAPACITY TO
BUY AND SELL.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.^(a)

Provided that where necessities are sold and delivered ^(b) to an infant, or minor,^(c) or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.^(d)

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.^(e)

NOTES.

(a) The "*general law concerning capacity*" will be that of England or Scotland according to the domicile of the party. The common-law rules are reserved by Sect. 61 (2). *Capacity* to contract is to be distinguished from *authority* to contract. Authority is part of the law of principal and agent which is also reserved by Sect. 61 (2).

(b) "*Sold and delivered.*" There must be not only a sale but also delivery. The technical expression "sale and delivery" means a sale upon which delivery has followed (NOTE (a), Sect. 1, *ante*, p. 2). By interpretation "*sale*" includes a "*bargain and sale*" as well as sale and delivery" [Sect. 62 (1)], but the ruling idea here is the benefit derived by the incapacitated person through the actual receipt of the goods. Delivery is therefore conjoined with sale, and both are *essential*.

(c) The word "*minor*" in this proviso was inserted when the bill was adapted to Scotland, but, for the reasons noted below (COM., p. 16) it is unnecessary, and is to some extent misleading.

(d) The *price* in the cases referred to does not result from contract, but from the equity of recompense. A person incompetent to contract cannot be held liable in an obligation regarding *undelivered* goods.

(e) This definition of "*necessaries*" expresses the law of England, but if it were required to apply it to Scotland it would be found unsuitable. It forms a rider to the preceding proviso

which, so far as regards minority in Scotland, is merely a superfluous addition to the leading rule of the section COM., *infra*, p. 15. Sect. 2.

COMMENTARY.

Except in regard to non-age the law as to capacity to contract is much the same in England and Scotland. Incapacity may apply to the following classes of persons:—

Outlaws.—In England since 1870 convicts are incapable of suing or making any contract except while they are lawfully at large under any licence,¹ but the Act containing this provision does not apply to Scotland where the incapacity seems to be confined to persons outlawed or under sentence involving forfeiture of their estates.² But “those who lie under a legal incapacity, *e.g.* by attainder, if they come under an obligation cannot object their incapacity against the creditor, being excluded *personali objectione*,³ for, as attainder is designed not as a benefit but as a punishment to the person attainted, it cannot be pleaded by him as a pretence to be released from his just engagements.”⁴ Outlaws.

Alien enemies cannot sue for debt during war, but they may bind themselves by contract and may enforce it after the war has ceased.⁵ In bankruptcy a dividend may be set aside for an alien enemy as a contingent debt.⁶ Alien enemies.

Married women.—Previous to the Married Women's Property Acts⁷ a married woman could not contract except as agent for her husband in virtue of an express or implied mandate from him. But the Acts seem to give a certain amount of contractual power to a wife without her husband's consent.⁸ Married women.

¹ 33 & 34 Vict. c. 23, Sects. 8, 30.

² Stair, iii. 3, 39; Ersk. iii. 1, 16.

³ *Serra v. E. of Cornwall* (1725), Mor. 10449.

⁴ Ersk. iii. 1, 16.

⁵ Bell's *Com.* i. 326; Bell's *Prin.*, Sects. 43, 2135; Pollock on *Contract*, 6th ed. p. 92.

⁶ Bell's *Com.* i. 326.

⁷ England (1870), 33 & 34 Vict. c. 93; (1874), 37 & 38 Vict. c. 50; (1882), 45 & 46 Vict. c. 75, repealing the two previous Acts. Scotland (1877), 40 & 41 Vict. c. 29; (1881), 44 & 45 Vict. c. 21.

⁸ Bell's *Prin.*, 9th ed., Sect. 1560 A *et seq.*; Benjamin on *Sale*, p. 34 *et seq.*

Sect. 2.
Lunatics.

Lunatics.—In Scotland these are divided into fatuous persons or idiots “who are entirely deprived of the faculty of reason,” and furious persons who “cannot be said to be deprived of judgment, for they are frequently known to reason with acuteness,” but who “are seized with periodical fits of frenzy.”¹

The definition of an insane person given for the purpose of cognition by 31 & 32 Vict. c. 100, Sect. 101, is “one furious or fatuous or labouring under such unsoundness of mind as to render him incapable of managing his affairs.” Under the Act referred to, the old “brieve for the cognition of a person alleged to be *incompos mentis prodigus et furiosus*, or of a person alleged to be *incompos mentis fatuus et naturaliter idiota*,” can no longer be competently directed to the judge ordinary, and in its place certain procedure is directed for cognition before a judge of the Court of Session and a special jury.²

The nearest male agnate of twenty-five years of age who is himself capable of managing his own affairs is entitled, after cognition of the lunatic, to the office of guardian under the title of tutor-at-law.³ But the usual course is to apply to the Court of Session for the appointment of a *curator bonis*, which is granted without cognition on production of medical certificates of insanity.⁴ The general rules regulating the capacity of insane persons to buy and sell are the same in Scotland as in England. The contract is not in itself void, even where the party has been cognosced or where a *curator bonis* has been ap-

¹ Ersk. i. 7, 48; Bell's *Com.* i. 132 *et seq.*

² 31 & 32 Vict. c. 100; Act of Sed. 3rd December 1868.

³ 1474 c. 52.

⁴ Mackay's *Manual of Practice*, pp. 541, 542. The Lunacy Act 1890 (53 Vict. c. 5) does not, “unless otherwise expressly provided, apply to Scotland or Ireland” (Sect. 2). The sections which apply are 86 to 89 and 131. The last-mentioned section provides that “where a person has been found lunatic by inquisition in England or Ireland, and has personal property in Scotland, the committee of the estate of the lunatic shall, without cognition or other proceedings in Scotland, have all the same powers as to such property or the income thereof as might be exercised by a tutor-at-law after cognition, or a duly appointed *curator bonis* to a person of unsound mind in Scotland” [Sect. 131 (2)]. A similar power over property in England or Ireland is given to the tutor-at-law after cognition, or the *curator bonis*, of a lunatic in Scotland [Sect. 131 (3)].

pointed; for the lunatic may be re-convalescent, and may resume his administrations either with or without a formal declaration of the Court.¹ The act of the insane person is not necessarily, and in all circumstances, even voidable. "Contracts made by a person of unsound mind are not voidable at his option, if the other party to the contract believed him to be of sound mind at the time the contract was made. In order to avoid a fair contract upon the ground of insanity, the mental incapacity of the party seeking to avoid it must be known to the other contracting party. . . . The burden of proving both the insanity and the plaintiff's knowledge of it lies on the defendant."²

*Intoxicated persons.*³—"Intoxication as a ground of relief from an obligation is, in general, to be set forth as a plea of fraud. It cannot be said that there is consent where the mind is for the time destroyed by intoxication; and, standing alone, it will be a good ground of reduction that the party was so drunk as not to know what he did; or, according to Erskine, 'in a state of absolute drunkenness and consequently deprived of the exercise of reason.'⁴ In general, intoxication only 'darkens reason' and does not of itself invalidate a contract; but the advantage taken of this state of imbecility may infer the existence of fraud, or aid the force of the objection grounded on deceit or extortion."⁵ The contract of an intoxicated person is in the same position as that of a lunatic. "The contract of a lunatic or drunken man who by reason of lunacy or drunkenness is not capable of understanding its terms or forming a rational judgment of its effect on his interests is not void, but only voidable at his option: and this, only if his state is known to the other party. The

Intoxicated
persons.

¹ Bell's *Prin.*, Sect. 2107. *Inglis v. His Tutor* (1701), 4 Br. Sup. 517; 5 Br. Sup. 5. *Bryce v. Graham* (1828), 6 Sh. 425, Affd. 3 W. & S. 323; *Lockhart, Petr.* (1862), 24 D. 1086; *Nisbet's Trustees v. Nisbet* (1871), 9 Macp. 937.

² Per Lopes, L. J., in *Imperial Loan Co. v. Stone* [1892], 1 Q.B. 297.

³ The words "drunkard" and "drunkenness" are commonly used by English text-writers, although they refer to habit rather than to state or condition. A person may be denominated "drunkard" who is not, at all times, intoxicated. But the word "drunkenness" in the sense of intoxication at the time of the contract, has by this section acquired statutory sanction.

⁴ Ersk. iii. 1, 16. See also iv. 4, 5. Stair, ii. 11, 21.

⁵ Bell's *Com.* i. 317.

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defendant who sets up his own incapacity as a defence must prove not only that incapacity, but the plaintiff's knowledge of it at the date of the contract."¹

Differences
between Eng-
lish and
Scottish law
of non-age.

It only remains to consider *non-age* in regard to which the law of Scotland differs materially from that of England. The leading points of difference are as follows:—

1. England recognises only one *status*—that of “infancy,” which extends from birth to the age of twenty-one. Scotland divides the period into “pupilarity” and “minority,” the former extending from birth to the age of twelve in females and fourteen in males; the latter extending in each case to the remaining years up till twenty-one.

2. The incapacity of an “infant” in England is more nearly analogous to that of a “pupil” in Scotland than to that of a minor. Hence the Guardianship of Infants Act 1886,² which applies to both countries, in effect defines “pupil” as the Scottish equivalent of “infant.” Minors are therefore excluded from the provisions of that Act, although a similar period of non-age in England falls within its scope.³

3. In England an infant cannot contract, but a minor in Scotland is not similarly incapacitated. A minor who has curators and contracts without their consent is not bound

¹ Pollock on Contract, 6th ed. p. 89; *Molton v. Camroux* (1848), 2 Ex. 487, 4 Ex. 17; *Matthews v. Baxter* (1873), L.R. 8 Ex. 132. See also the following Scottish cases:—*Halloun v. Northesk* (1672), Mor. 13384; *Gardner v. Tenant* (1677), 3 Br. Sup. 162; *A. v. B.* (1682), 2 Br. Sup. 19; *M'Kie v. Maxwell* (1752), Mor. 4963; *Jardine v. Elliot* (1803), Hume 684; *Hunter v. Stevenson* (1804), Hume 686; *Johnston v. Brown* (1823), 2 Sh. 495; *Johnston v. Clark* (1854), 17 D. 229; *Couston v. Miller* (1862), 24 D. 607; *Taylor v. Provan* (1864), 2 Macp. 1226; *Pollock v. Burns* (1875), 2 Ret. 497. The learned editor of Bell's *Prin.* [9th ed. p. 15, note (f)] says:—“It is difficult to suppose a case of intoxication avoiding a deed without some degree of fraud, but such cases may occur, especially if both parties are the worse of drink, where there is such a degree of intoxication as to make one utterly incapable of entering into business transactions. In all cases the party seeking relief will be barred from pleading his intoxication unless he makes his challenge as soon as he comes to his senses and knows what he is said to have done. It seems that he may ratify the agreement, and that the other party who contracted with him, knowing his condition, may be held to his bargain. But if both were drunk, *quære*? The cases of *Jardine v. Elliot* (1803), Hume 684, and *Hunter v. Stevenson* (1804), Hume 686, show that drunkenness may merely be an element in proving that the parties did not really intend to make a serious bargain.”

² 49 & 50 Vict. c. 27.

³ But see Judicial Factors (Scotland) Act 1880 (43 & 44 Vict. c. 4), Sect. 4, as interpreted by *Penny v. Penny* (1894), 32 S.L.R. 9.

unless for "necessaries," but if he has no curators, he may, **Sect. 2.** with a few exceptions, lawfully perform any act competent to a person of full age.

4. In Scotland the contracts of a pupil are entered into by his legal guardian (tutor), the pupil himself neither contracting nor consenting. But a contract to which a pupil is a party, even without his guardian's consent, is not necessarily void. If it is for the pupil's advantage, the other contracting party may be held bound. A minor who has guardians (curators) contracts with their consent: if he has no curators he validly contracts in his own name alone. If, however, a minor with curators contracts without their consent he is entitled to the same privilege as a pupil, and therefore the contract is not void as regards the other contracting party if it is the minor's interest to enforce it. In England the contract of an infant is said to be absolutely void, but apart from the special provisions of the Infants Relief Act 1874¹ it is in the view of modern authorities² only voidable, and may be enforced against the other party. The Act referred to introduces a difficulty by expressly enacting that the contract of an infant where voidable at common law shall be void.³

5. In Scotland the contract of a person in non-age, whether pupil or minor, and whether entered into by himself, or by, or with the consent of, his guardian, may be reduced within four years after majority upon proof of serious injury to his person or estate (*lésion enorm.*). But the contract of a pupil entered into by his tutor on his behalf, or that of a minor entered into by himself (or if he has curators by himself with their consent), is valid, and cannot be reduced on the ground of minority, if the four years referred to are suffered to elapse. Further, a party may at any time after arriving at full age validly adopt a contract made in non-age and that either expressly or by implication. In England, on the contrary, it is expressly provided by the Infants Relief Act⁴ already referred to that "no action shall be

¹ 37 & 38 Vict. c. 62.

² Pollock on *Contract*, 6th ed. p. 58; Benjamin on *Sale*, 4th ed. p. 23.

³ 37 & 38 Vict. c. 62, Sect. 1.

⁴ (1874), 37 & 38 Vict. c. 62.

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brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any *ratification made after full age* of any promise or contract made during infancy, whether there shall or shall not be any new consideration ¹ for such promise or ratification after full age." ²

6. The status of a young person above the age of twelve (females) and fourteen (males), but under the age of twenty-one, is essentially different in Scotland and in England. In Scotland the contract of a minor is not void: it is at most only voidable, and, speaking generally, it requires to be set aside by a decree of Court. A minor who has represented himself as of full age cannot reduce his contract if the other party has acted *bonâ fide*.³ He may contract for necessities; he may enter into trade ⁴ either alone or in partnership;⁵ he may be made bankrupt;⁶ and he may, as we have seen, at any time after full age, expressly or impliedly adopt a voidable contract made during minority so as to exclude any future reduction even within the *quadrennium utile*.⁷ In nearly all these respects the law of England differs. An infant cannot trade or be made bankrupt. Speaking generally, he cannot "make any conveyance or purchase that will bind him, nor enter into a binding contract, nor, in short, do any legal act."⁸ He is not liable even if he fraudulently represent himself as of full age; he requires no judicial process of reduction to set aside his deed, but may plead infancy by way of defence and without any time limitation; and finally, after he arrives at full age, he is prevented by statute from entering into any new contract which imports an adoption or ratification of a contract made during infancy.⁹ It may be stated as an objection to the English law of non-age that it makes little distinction between the contract of a boy of ten and that of a youth of twenty, and that much

¹ As to the English doctrine of Consideration, see Appendix III. *post*, p. 341.

² 37 & 38 Vict. c. 62, Sect. 2.

³ Stair, i. 6, 44.

⁴ Stair, i. 6, 44; Ersk. i. 7, 38; Bell's *Com.* i. 181.

⁵ *Galbraith v. Lesly* (1676), Mor. 9027; *Wilson v. Laidlaw*, Affd. H.L. (1816), 6 Pat. App. 222.

⁶ Goudy on *Bankruptcy*, pp. 76, 77.

⁷ Ersk. i. 7, 39.

⁸ Stephen's *Com.* 10th ed. ii. 324.

⁹ Infants Relief Act *supra*.

practical inconvenience results from continuing absolute incapacity beyond the limits which seem prescribed by nature.¹ Sect. 2.

The definition of "*necessaries*" set forth in the section Necessaries. does not accurately represent the law of Scotland. The section does not enact any change in the common law,² and it is therefore of importance that the law of Scotland on this subject should be distinguished. The words "suitable to the infant or minor's *actual requirements* at the time of the sale and delivery," imply that the seller must take the risk of these requirements having been otherwise supplied. But in Scotland, if the goods sold are in their own nature suitable for the clothing, education, or maintenance of a minor according to his station in life, the seller is not put upon enquiry as to whether the minor is already furnished.³ The transaction in Scotland is recognised as a legal contract,⁴ and as such it would be unreasonable to put one of the contracting parties to such serious disadvantage as to infer nullity of his claim for the price of goods supplied, if his knowledge of the private resources or supplies of the other party should turn out to be inaccurate. Yet such is the law of England. "A tradesman dealing on credit with an infant does so at his peril, and must lose his money if the infant does not voluntarily pay him, unless he can prove that the goods supplied were necessaries for the infant according to his station in life. That being the law, we come to the question what are necessaries. To determine this we must take into account *what the infant had at the date of giving the order.*"⁵ No regard is to be paid to the fact that it is not within the tradesman's knowledge that the infant is amply

¹ "Though equity keepeth not one time for the attainment of reason, but takes it as soon as it truly is, which in some is much sooner and in others much later, yet positive law, following that which is most ordinary for stability's sake, fixes it at the end of pupillarity."—Stair, i. 10, 13.

² The common law where not expressly altered is reserved by Sect. 61 (2).

³ *Johnston v. Mailland* (1782), Mor. 9036; *Scofield v. Read* (1783), Mor. 8936. In the latter case it was held that the pursuer was bound to prove that money advanced was afterwards usefully applied to the clothing, education, or maintenance of the minor, but in regard to furnishings of wearing apparel an allegation that the father had already made suitable provision for his son was held irrelevant. See also *Wilkie v. Dunlop and Co.* (1834), 12 Sh. 506.

⁴ Stair, i. 6, 44; Ersk. i. 7, 33; M. P. Brown on *Sale*, p. 169.

Per Lopes, J., in *Barnes v. Toys* (1884), 13 Q.B.D. 410 at p. 413.

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supplied.¹ Again, in England, "the supply of necessities to an infant creates only a liability on simple contract, and it cannot be made the ground of any different kind of liability. . . . A *deed*, therefore, given by an infant to secure the repayment of money advanced to buy necessities is voidable."² In Scotland, on the contrary, bonds, bills, and other written obligations by minors have been again and again sustained, not merely where they represented the price of necessities already furnished, but where they were granted for money advanced, provided it was proved that the amount of the advance was afterwards usefully employed for the minor's benefit.³ "Minors are effectually obliged by their own acts and deeds, and even by bonds of borrowed money granted by them, though without the consent of their curators, for all sums that have been profitably applied to their use."⁴

Misapplication
of word
"minor."

As a "minor" may, under certain conditions, validly contract, the attempt to adapt the section to Scotland by adding the words "*or minor*" is founded on a misapprehension. Where the words occur in the second paragraph they are unnecessary, and in the third paragraph they are not only unnecessary but misleading.

Formalities of the Contract.

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CONTRACT OF
SALE, HOW
MADE.

3. Subject to the provisions of this Act^(a) and of any statute in that behalf,^(b) a contract of sale^(c) may be made in writing^(d) (either with or without seal),^(e) or by word of mouth,^(f) or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.^(g)

Provided that nothing in this section shall affect the law relating to corporations.^(h)

¹ *Barnes v. Toye* (1884), 13 Q.B.D., 410. See also *Johnstone v. Marks* (1887), 19 Q.B.D., 509.

² Pollock on *Contract*, 6th ed. pp. 70, 71.

³ E.g. in *Gordon v. Earl of Galloway* (1629), Mor. 8941; *Stuart v. Stuart and Hume* (1639), Mor. 8943; *Wilkie v. Dunlop and Co.* (1834), 12 Sh. 506.

⁴ Ersk. i. 7, 33. See also Stair, i. 6, 44.

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(a) The provisions referred to are contained in Sect. 4, and do not apply to Scotland.

(b) *E.g.* the Merchant Shipping Act 1894,¹ and the 4th section of the Statute of Frauds.²

(c) "*Contract of sale* includes an agreement to sell as well as a sale" [Sect. 62 (1)].

(d) An informal writing (*i.e.* in Scotland, a writing neither holograph nor tested) may be accepted as evidence, but, if challenged, it will not be conclusive. By the Interpretation Act 1889³ "expressions in any Act referring to writing shall, unless the contrary intention appears, be construed as including references to printing, lithography, photography, and other modes of representing and reproducing words in a visible form."

(e) In England a seal is essential to a formal deed or covenant. Any signed writing without seal is, however, sufficient to evidence a "simple contract," and also to satisfy the requirement of writing introduced by the Statute of Frauds. Sealing is not necessary in Scotland, but the effect of certain *British* statutes, *e.g.* the Merchant Shipping Acts, has been to extend to Scotland the English requirement of a seal in the particular matters to which these statutes relate.⁴

(f) The phrase "*by word of mouth*" is used to avoid the ambiguity connected with the word "*verbal*," which in England is applied to any contract, written or unwritten, which is not evidenced by deed under seal. The proof of a contract by word of mouth may be strengthened by presumptions arising from the subsequent conduct of the party denying it.⁵

(g) "*Conduct of the parties*," *e.g.* where parties act upon a draft agreement not signed or completed,⁶ or where goods are sent on "sale or return" and are kept an unreasonable time.⁷ Assent

¹ 57 & 58 Vict. c. 60. See Appendix I. *post*, p. 307.

² 29 Car. II. c. 3. See Appendix I. *post*, p. 291.

³ 52 & 53 Vict. c. 63, Sect. 20.

⁴ See the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), Sect. 65, and relative form of Bill of Sale, Appendix I. *post*, p. 311. In company law the Scottish mode of authentication has been preserved or at least rendered optional (30 & 31 Vict. c. 131, Sect. 37; 37 & 38 Vict. c. 94, Sect. 56).

⁵ *M'Fadden v. Harsewell* (1802), Hume 330.

⁶ *Brogden v. Metropolitan Railway Co.* (1877), H.L. 2 App. Ca. 666.

⁷ *Beverley v. Lincoln Gas Co.* (1837), 6 A. & E. 829. "When an offer is made to another party, and in that offer there is a request, express or implied, that he must signify his acceptance by doing some particular thing, then as soon as he does that thing he is bound."—Per Lord Blackburn in *Brogden v. Metropolitan Railway Co.*, 2 App. Ca. at p. 691. See as to the effect of usage in the contract of hire-purchase, *Marston v. Kerr's Trustee* (1879), 6 Ret. 898.

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"may be signified by a nod or a gesture, or may even be inferred from silence in certain cases; as if a customer takes up wares off a tradesman's counter and carries them away and nothing is said on either side, the law presumes an agreement of sale for the reasonable worth of the goods."¹ But the conduct founded on must be that of the parties themselves. Thus evidence as to usage of trade was held inadmissible in a question whether a concluded contract of sale had been made through brokers.²

(h) Corporations in England signify their corporate intention by means of a seal. Their seal forms their signature. Corporations in Scotland are not similarly restricted, except in so far as they are affected by British statutes [see note (e) *supra*].

COMMENTARY.

This section is declaratory of the law of Scotland³ as well as that of England.⁴ The special restrictions upon freedom of contract in England arising from the Statute of Frauds or the substituted provisions of this Act [Sect. 4]

Statute of
Frauds.

¹ Benjamin on *Sale*, p. 43. Blackstone's *Com.* b. 2 c. 30, quoted and approved by Tindal, C. J., in *Hoodley v. M'Laine* (1834), 10 Bing. 482. But see *Hunter v. Duff* (1831), 9 Sh. 703; *Affid.* (1832), 6 W.S. 206; *M'Lean and Hope v. Thomas* (1869), 42 Sc. Jur. 159.

² *Towill and Co. v. The British Agricultural Association* (1875), 3 Ret. 117. "The English cases as to the completion of the contract of sale through brokers turn mainly on the 17th section of the Statute of Frauds."—Bell's *Com.* i. 460, editor's note.

³ Stair, i. 14. 1; Ersk. iii. 3. 2, and iv. 2. 20; Bell's *Com.* i. 458; Bell's *Prin.*, Sect. 89; Bell on *Sale*, p. 32; M. P. Brown on *Sale*, p. 2; *Hamilton v. Richard* (1898), Mor. 12412; *Gibb v. Walker* (1751), Elch. Caut. No. 19; *Carruthers v. Bell* (13th November 1812), F.C.; *Pollock and Dickson v. M'Andrew* (1828), 7 Sh. 189; *Wilson v. Walker* (1856), 18 D. 673. But see *Allans v. Gilchrist* (1875), 2 Ret. 587. "Sale is a mutual and reciprocal contract in which both parties are bound or neither"—Bell on *Sale*, p. 32. There may be circumstances where one only of the parties is legally bound, as, e.g., in *Graham and Co. v. Pollock and Caldwell* (1763), Mor. 14198, but the contract of hire with an option to purchase has been recently held not to be a sale although the lender is bound to give effect to the hire-purchaser's option by turning the hire into instalments of the price—*Helby v. Matthews and others*, H.L., 30th May 1895. A contract of sale completed verbally cannot be opened up by a subsequent request for writing—*Martin and Sons v. Robertson, Ferguson, and Co.* (1872), 10 Macp. 949; nor can a contract completed by correspondence, except in one particular not afterwards insisted in, be resiled from on other grounds—*Jack v. Roberts and Gibson* (1865), 3 Macp. 554.

⁴ In other departments of sale the laws of England and Scotland differ in regard to the formalities of the contract. Thus in England a sale and transfer of incorporeal moveables such as debts, shares, debentures, and other rights may be proved parole, at least to the effect of constituting an equitable right in the transferee, but in Scotland similar rights cannot be transferred without writing. As to the effect in England of an assignment in writing of a debt or other legal chose in action, see Judicature Act 1873 (36 & 37 Vict. c. 66), Sect. 25 (6).

have no place in the law of Scotland, and are reserved by this section but not enacted.¹ The English doctrine of "Consideration" may also be classed as one of the formalities of the contract, the absence of which from the law of Scotland forms a distinguishing feature not specially referred to in the Act.² It might be supposed that the contract of sale is beyond the reach of the doctrine of "Consideration," seeing that in sale the price, however inadequate, forms a "consideration," and thus satisfies the requirement. But even in sale the influence of the doctrine is felt. In England, if A offers to sell to B, and specifies a time within which the offer may be accepted, he may withdraw his offer before the time has expired, provided B has not previously accepted it.³ This is due to the absence of "consideration" (in the English sense) for A's obligation not to withdraw. In Scotland A would be bound to keep the offer open until the expiry of the time mentioned.⁴

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Doctrine of
Consideration.

Offer and ac-
ceptance.

Effect of
posting.

It was settled by *Dunlop v. Higgins*⁵ (1848), a House of Lords appeal from Scotland, that the posting of an acceptance in due time completes the bargain, even if through the fault of the post-office it does not reach the offerer, or has been unduly delayed. Some subsequent English judgments were contrary to this view, *Dunlop v. Higgins* not being recognised as an authority in England;⁶ but these have now been overruled on the express authority of the Scotch appeal.⁷ It is to be observed, however, that

¹ See Appendix I. *post*, p. 291, and Appendix III. *post*, p. 343.

² The leading characteristics of the doctrine of "Consideration" will be found in Appendix III. *post*, p. 341.

³ *Cook v. Oxley* (1790), 3 T.R. 653; *Dickenson v. Dodds* (1876), 2 Ch. Div. 463.

⁴ Bell's *Com.* i. 344; Bell on *Sale*, pp. 33, 38; *Marshall and McKell v. Blackwood* (1747), Elohie's *Sale*, No. 6. But see *Hogg v. Elliot* (1877), 14 S.L.R. 229. Referring to the English rule Bell says: "One cannot help feeling that a rule so different from what commonly happens in the intercourse of life raises that inconsistency between law and justice which is sometimes complained of."—Bell on *Sale*, p. 34.

⁵ 1 H. of L. Cases 381: in the Court of Session (1847), *sub. nom. Higgins v. Dunlop*, 9 D. 1407.

⁶ *E.g. The British American Telegraph Co. v. Colson* (1871), L.R. 6, Ex. 108.

⁷ *Imperial Land Co. of Marseilles [Harris' Case]* (1872), 7 Ch. App. 587; *The Household Fire Insurance Co. v. Grant* (1879), 4 Ex. Div. 216. In *Harris' Case* James, L. J., said: "The Vice-Chancellor's decision seems to me

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the same rule will not hold in the case of a revocation of an offer, it being held in England that such revocation must be *received* by the party to whom it is addressed before the contract has been completed by the posting of an acceptance.¹ The effect of a revocation of an acceptance received by the offerer prior to or at the same time as the acceptance itself, seems to be still an open question. The Scottish case *Dunmore v. Alexander*² (1830), relating to a contract of service, supports the view that the revocation will be effectual; but this judgment was given before *Dunlop v. Higgins*, and is inconsistent with the theory that the contract has been completed by the mere despatch of the acceptance. Probably when the question is again raised the finality of the contract consequent upon the posting of the acceptance will be consistently applied both in England and Scotland.³

Sale of ships.

The formalities of the contract in the case of ships suggest a question of considerable importance. Ships are clearly "goods" as defined by Sect. 62 (1) of this Act, and therefore, unless there is some other "statute in that behalf," they may be transferred by "word of mouth." The older Merchant Shipping Acts undoubtedly prescribed writing, and not only so, but, as interpreted by the Courts both of England and Scotland, they rendered absolutely void any contract not in the particular form provided by the Acts, or not registered in the terms of their provisions.⁴ In this

to be utterly indistinguishable in principle, or in fact from *Dunlop v. Higgins*, a case which is *binding upon us*" (7 Ch. App. at p. 591). See as to the present law of Scotland on this subject, *Jacobsen, Sons and Co. v. Underwood and Son, Limited* (1894), 21 Ret. 654. Where an order by telegram was, through the fault of the telegraph office, so altered in transmission that goods were despatched to a non-existing person there was held to be no contract.—*Verdin Brothers v. Robertson* (1871), 10 Macp. 35.

¹ *Stevenson v. M'Lean* (1880), 5 Q.B.D. 346; *Byrne v. Van Tienhoven* (1880), 5 C.P.D. 344; *Henlhorn v. Fraser* (1892), 2 Ch. 27. See specially the remarks of Lindley, J., in *Byrne's Case*, 5 C.P.D. at p. 347.

² 9 Sh. 190.

³ The question is discussed by the editors of Benjamin on *Sale*, 4th ed. pp. 56, 57.

⁴ See as to Scotland *Spence v. Muir* (20th January 1809), F.C.; *Leitch v. Berry* (20th May 1819), F.C.; *Calder v. Miller* (1824), 3 Sh. 253; *M'Arthur v. M'Briar and Johnston's Trustee* (1844), 6 D. 1174; *Ord v. Barton* (1846), 8 D. 1011. But in the older case of *M'Nair v. Millar* (2nd December 1808), F.C., letters exchanged, though not conform to the statute, were held to confer a

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respect the enactments were far more rigid than the corresponding rules regarding heritage in Scotland, for although these require writing in the constitution of the contract, a formal title is not necessary to the validity of the personal contract where the registered rights of third parties are not in question. The progress of shipping legislation, however, has been towards greater freedom of contract, and it has now reached the point that personal rights in Scotland and "equitable interests" in England are freely recognised apart from formal title and registration.¹ But since registration of a transfer in a particular form is not now necessary to the validity of a personal contract for the sale of a ship, the question arises whether *writing* is still essential to the constitution of the contract. Writing, as we have seen, is necessary in the case of a sale of heritage in Scotland,² and it is also necessary under Sect. 4 of this Act in the case of the sale of a ship in England, but there is no longer any statutory provision making writing essential to the validity of a contract for the sale of a ship in Scotland. It would seem, therefore, that such a sale may now be validly contracted without writing so as to bind the contracting parties and their representatives, though it would not be effectual against *bond-fide* holders of a registered title.³ The nature of shipping property is, however, so exceptional that a verbal contract⁴ for the sale of a ship is not likely to be

personal right; and in *Mill v. Hoar* (18th December 1812), F.C., an arrester was preferred to a party subsequently registered as owner. The development of the law of England on this subject is ably treated by Lord Justice Lindley. — *Law Magazine* (1862), vol. xiii. p. 70.

¹ Cf. 34 Geo. III. c. 68, Sect. 14, and 3 & 4 William IV. c. 55, Sect. 32, with 17 & 18 Vict. c. 104, Sect. 37 (2); 25 & 26 Vict. c. 63, Sect. 3; and the present Merchant Shipping Act, 57 & 58 Vict. c. 60, Sects. 5 (ii.) & 57. The sections of the existing Act will be found in Appendix I. *post*, pp. 307, 309. *Duthie v. Aiken* (1893), 20 Ret. 241, is a recent example of the recognition of beneficial interests. A similar relaxation and admission of "equitable interests" is now recognised in the statutory law of patents; cf. 15 & 16 Vict. c. 83, Sect. 35, with 46 & 47 Vict. c. 57, Sect. 87.

² This is partly due to the old statutes and partly to the common law.

³ Writing was not necessary to the sale of a ship in Scotland prior to the statutory law on the subject—*Cathcart v. Holland* (1681), Mor. 8471. In *Hamilton v. Gordon* (1710), Mor. 14195, a party who bought a ship at a public auction was held to be free because he had not signed the Articles of Roup although the purchase was otherwise admitted; but this decision can be explained on the ground that the parties had prescribed writing for themselves. ⁴ "Verbal" is here used in its popular sense. See note (f) *supra*.

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of frequent occurrence. The proof would require to be exceptionally clear to overcome the presumption arising from contrary usage.

Quinquennial prescription.

The contract of sale falls within the quinquennial prescription or limitation introduced by the Act 1669 c. 9, which provides that bargains concerning moveables "shall only be provable by writ or oath of party if the same be not pursued for within five years after the making of the bargain."¹ The Act, however, only applies to verbal bargains, and has no application to sales constituted by writing.² After the five years the subsistence of the debt as well as the constitution of the obligation must be proved by the writ or oath of the alleged debtor.³

Triennial prescription.

The triennial prescription,⁴ which is of still older date than the quinquennial, also applies to certain kinds of sales not constituted or evidenced by writing. The words "merchantes compts" in the Act of 1579 "mean primarily accounts incurred to shopkeepers or sellers of wares on credit. The term, in connection with the general phrase of 'the like debts,' embraces accounts to dealers whether wholesale or retail . . . and generally all accounts for furnishings, labour, and the like which are apt to run into credit, and which, being contracted without writing, are likely to be discharged without that formality."⁵ But it does not apply to accounts-current between merchants⁶ or to accounts for commission charged by mercantile agents on goods purchased by them.⁷ It has been doubted whether it includes

¹ *E. Southesk v. Keddy and Simpson* (1682), Mor. 11066; *White v. Spence* (1688), Mor. 11065; *Ewart v. Murray* (1730), Mor. 11067; *Moffat v. Moffat* (1737), Mor. 13214; *Nobles v. Armstrong* (1st June 1818), F.C.; *Lawson v. Milne* (1839), 1 D. 608.

² *Hunter v. Thomson* (1843), 5 D. 1285. "The prescription . . . has evidently been designed to cover those independent mercantile transactions regarding moveables which, from not being parts of current accounts, were not protected by the triennial prescription."—Dickson on *Evidence* (Grierson's ed.), Sect. 477.

³ *E. Southesk v. Keddy and Simpson* (1682), Mor. 11066; *White v. Spence* (1688), Mor. 11065; *Nobles v. Armstrong* (1st June 1818), F.C.; *Campbell v. Grierson* (1848), 10 D. 361; *Kennard and Sons v. Wright* (1865), 3 Macp. 946.

⁴ Act 1597 c. 83.

⁵ Dickson on *Evidence* (Grierson's ed.), Sect. 492.

⁶ *M'Kinlay v. Wilson* (1885), 13 Ret. 210. But see *Batchelor's Trustees v. Honeyman* (1892), 19 Ret. 903.

⁷ *Brown v. Brown* (1891), 18 Ret. 889.

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a claim for the price where the sale is that of an isolated article,¹ or where a number of articles are sold under one contract, but delivered at different times.² The prescription, as applied to merchants' accounts, does not run on each separate item, but only on the whole account when closed, so that a new item within three years of the preceding one, if added *bona fide* and not for the mere purpose of eliding the prescription, will preserve the currency of the account.³ The statute excludes debts founded on "written obligations," but the obligation must be completed in writing so as to bind both parties, and therefore a mere order for goods,⁴ or a written order verbally accepted and acted upon,⁵ will fall within the prescription. It is not necessary, however, in order to exclude the statute, that the writing should be probative in the sense of being either tested or holograph.⁶

Effect of the prescriptions.

The effect of the quinquennial and triennial prescriptions is not to cut off all claim, but to limit the proof to the "writ or oath" of the alleged debtor in the obligation.⁷ The original constitution and also the continued existence of the obligation must in the absence of writing be established by the oath of the other party to the action under a judicial reference. Under such a reference, unless the party examined admits that the obligation was contracted and still exists, or unless he admits circumstances which necessarily infer that result, the oath will be negative.⁸

¹ See *Baird v. Montgomery* (1688), Mor. 11092; *Ewart v. Murray* (1730), Mor. 11067; *M'Gregor v. Stewart* (1811), Hume 472; *Smith v. Millar* (1827), 5 Sh. 338; *Gobbi v. Lazzaroni* (1859), 21 D. 801.

² See *Bruce v. Jack* (1670), 1 Br. Sup. 609; *Macdougall v. Campbell* (1830), 8 Sh. 959, H.L. (1833), 7 W.S. 19. In the latter case the Court of Session held that the statute applied, but in the House of Lords the point was considered doubtful.

³ *Mason v. E. Aberdeen* (1709), Mor. 11094; *Fisher v. Ure* (1836), 14 Sh. 660; *Stewart v. Scott* (1844), 6 D. 889; *Aytoun v. Stoddart* (1882), 9 Ret. 631; *Ross v. Cowie's Executrix* (1888), 16 Ret. 224.

⁴ *Cheap v. Cardiner* (1775), Mor. 11111; *Ross v. Shaw* (1784), Mor. 11115, *Douglas v. Grierson* (1794), Mor. 11116.

⁵ *Chalmers v. Walker* (1878), 6 Ret. 199.

⁶ *Black v. Shand's Creditors* (1828), 2 Sh. 118; *Watson v. Hunter and Co.* (1841), 3 D. 583; *Wood v. Howden* (1843), 5 D. 507; *Watson v. Johnston* (1846), 18 Sc. Jur. 598; *Macandrew v. Hunter* (1850), 13 D. 1111.

⁷ The bargain prescribes *quoad* the manner of probation by witnesses, and an offer to prove delivery *juramento* is irrelevant unless the continued resting-owing of the price is also referred to oath.—*White v. Spence* (1683), Mor. 11065.

⁸ *Cowbrough and Co. v. Robertson* (1879), 6 Ret. 1801.

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Prescription as
applied to
foreign obli-
gations.

In the case of an obligation incurred in England or abroad the effect of prescription in Scotland has been much discussed. The question may, however, be taken as settled in conformity with *Don v. Lippman*¹ (1837), where in the course of giving judgment in the House of Lords, Lord Brougham laid down the following rule: "Whatever relates to the nature of the obligation—*ad valorem contractus*—is to be governed by the law of the country where it was made, the *lex loci*; whatever relates to the remedy by suits to compel performance, or by action for a breach *ad decisionem litis* is to be governed by the *lex fori*—the law of the country to whose Courts the application is made for performance or for damages. . . . Assuming this to be the settled rule here, the only question is whether the limitation of action belongs to the contract or the remedy." ² In reference to the argument that statutory limitations of the mode of proof refer to the contract itself, and not merely to implement, Lord Brougham observed that the parties "looked to performance only, and to the time of performance; the argument supposes them to have looked to a breach. . . . Nothing can be more violent than the supposition that the breach of the contract is in the contemplation of the parties, and indeed nothing more contrary to good faith." ³ Upon the authority of this and other cases it may be held as settled that such prescriptions as the quinquennial and triennial, which only limit the mode of proof and do not affect the obligation itself, are enforceable in Scotland although the contract may have been entered into beyond the limits of Scottish jurisdiction. On the same principle no effect can be given in Scotland to any similar prescription or limitation existing in the *lex loci contractus*.

Sect. 4.

CONTRACT OF
SALE FOR TEN
POUNDS AND
UPWARDS.

4.—(1.) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action^(a) unless the buyer shall accept^(b) part

¹ 2 Sh. & M'L. 682, reversing *Lippman v. Don* (1836), 14 Sh. 241.

² 2 Sh. & M'L. at pp. 723, 724.

³ 2 Sh. & M'L. at p. 728.

of the goods so sold, and actually receive^(b) the same, Sect. 4. or give something in earnest^(c) to bind the contract, or in part payment,^(c) or unless some note or memorandum in writing^(d) of the contract be made and signed by the party to be charged or his agent in that behalf.

(2.) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery,^(e) or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.^(f)

(3.) There is acceptance^(g) of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4.) The provisions of this section do not apply to Scotland.^(h)

NOTES.

(a) "*Enforceable by action.*" These words were substituted in Committee for "*allowed to be good,*"¹ but the substitution does not remove the objection long urged against the 17th section of the Statute of Frauds of which this section is practically a reproduction. The words as they now stand suggest that there is nothing illegal in entering into a verbal contract for the sale of goods of the value of £10 or upwards, but that if one of the parties does not keep to his bargain the other has no legal redress. The law, while recognising the right, refuses the remedy.

(b) "*Accept*"—"actually receive." Statutory force is here

¹ The change of phrase is in accordance with decision. The contract is "not void, still less illegal." See *Maddison v. Alderson* (1883), 8 App. Cas. 467.—Per Lord Blackburn at p. 488.

Sect. 4.

given to a judicial interpretation of "acceptance" as it appeared in the Statute of Frauds. Both actual receipt and acceptance are required to elide the statute, but it has been held that the acceptance may be such as to establish the contract, while not precluding the buyer from objecting that the particular terms of the contract were not fulfilled. The buyer may reject the goods as disconform to contract, though no longer at liberty to refuse implement on the ground that the contract itself is not in writing.¹ The provision in the present Act perhaps goes further than the common law so as to overrule such cases as *Taylor v. Smith*² (1892). It can scarcely be maintained that an examination of the goods by the buyer with the view of ascertaining whether they are in terms of the contract is not an act by him in "relation to the goods which recognises a pre-existing contract."³

(c) "*Earnest*"—"part payment." The giving of "earnest," though formerly a prevalent custom, has fallen into disuse. It is to be distinguished from "part payment," and "may be money or some gift or token given by the buyer to the vendor, and accepted by the latter to mark the final conclusive assent of both sides to the bargain."⁴ To distinguish it from part payment it is sometimes in Scotland called "*dead earnest*."⁵

(d) "*Writing*." It is not necessary that the writing should be in the form of a deed or be in itself probative; it is sufficient if the signature of the party to be charged is attached.⁶ The agreement may be gathered from several connected papers⁷ provided the connection appears from the documents themselves with or without the aid of parole evidence.⁸ The contract may be gathered from the terms of a series of letters,⁹ and even telegrams, where the instructions for the message are signed by the party, may be used along with the signed correspondence to show its terms.¹⁰

(e) "*Delivery*." Defined Sect. 62 (1).

(f) "*Fit for delivery*." This seems another mode of express-

¹ *Page v. Morgan* (1885), 15 Q.B.D. 258. See also *Morton v. Tibbett* (1850), 15 Q.B. 428; *Kibble v. Gough* (1878), 38 L.T. N.S. 204; Benjamin on *Sale*, p. 134 *et seq.*

² 2 Q.B. 62.

³ Sub-section (3). See also *Abbott v. Wolsey* (1895), 11 Times Law Rep. 414, where the decision of a Divisional Court on the lines of *Taylor v. Smith* was overruled by the Court of Appeal.

⁴ Benjamin on *Sale*, p. 172.

⁵ Ersk. iii. 3. 5.

⁶ *Reuss v. Picksley* (1866), L.R. 1 Ex. 342.

⁷ *Baumann v. James* (1868), L.R. 3 Ch. App. 508.

⁸ *Oliver v. Hunting* (1890), L.R. 44 Ch. Div. 205.

⁹ *Wilson v. Dunn* (1887), L.R. 34 Ch. Div. 569.

¹⁰ *Godwin v. Francis* (1870), L.R. 5 C.P. 295.

ing "*deliverable state*" which is defined by Sect. 62 (4). See also Sect. 4. Sect. 18, Rule 2.

(g) "*Acceptance.*" See note (b) *supra*.

(h) *Section not applicable to Scotland.* The section reproduces with additions and slight alterations the 17th section of the Statute of Frauds¹ and the 7th section of what is known as Lord Tenterden's Act,² both of which sections are repealed by this Act.³ Neither of the Acts referred to applies to Scotland, and therefore the provisions of this section are also excluded from operation there. The question remains whether a Scottish contract not in accordance with the section can be enforced in England. If *Leroux v. Brown*⁴ (1836) is authoritative, the answer will be negative, but considerable doubt has been thrown upon this judgment,⁵ and mercantile expediency, as well as the general principles of international law, point to the recognition in England of a valid Scottish contract.

Subject Matter of Contract.

5.—(1.) The goods^(a) which form the subject of a contract of sale^(b) may be either existing goods, owned or possessed^(c) by the seller, or goods to be manufactured^(d) or acquired by the seller after the making of the contract of sale, in this Act called "future goods."^(e)

Sect. 5.
EXISTING OR
FUTURE GOODS.

(2.) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency^(f) which may or may not happen.

(3.) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.^(g)

¹ (1677), 29 Car. II. c. 3. In the revised editions of the Statutes, Sect. 17 is numbered 16, and as such it is repealed by this Act. The text of the original section will be found in Appendix I. *post*, p. 291. See also Appendix III. *post*, p. 350.

² (1828), 9 Geo. IV. c. 14. See Appendix I. *post*, p. 292.

³ Sect. 60 and relative Schedule. A sketch of the history of the Statute of Frauds will be found in Appendix III. *post*, p. 343.

⁴ 12 C.B. 801.

⁵ *E.g.* by Willes, J., in *Williams v. Wheeler* (1860), 8 C.B. N.S. 299. See Blackburn on *Sale*, p. 2, note; Benjamin on *Sale*, p. 112, note.

Sect. 5.

NOTES.

(a) "*Goods.*" Defined Sect. 62 (1).

(b) "*Contract of sale.*" Defined Sects. 1 & 62 (1). The subject of the contract must be an actual sale, not a security [Sect. 61 (4)].

(c) "*Owed or possessed.*" Possession as an alternative to ownership may refer to goods held by seller or buyer as bailee for the other party (e.g. Sects. 20 & 25), or to an agent having a power of sale.

(d) "*Manufactured.*" Formerly there was an implied undertaking in English law that goods sold by a manufacturer were manufactured by himself. The rule is by this Act assimilated to Scots law where there is no such implication. See COM. *infra*.

(e) "*Future goods.*" Similarly defined in Sect. 62 (1).

(f) "*Contingency.*" But if the contract amounts to a wager it is still illegal. See Gaming Act, 1845 (8 & 9 Vict. c. 109), Sect. 18, preserved by Sect. 61 (3).

(g) "*Agreement to sell.*" Defined Sect. 1 (3).

COMMENTARY.

Existing and
future goods.

The subject matter of sale is here divided into (1) "existing goods," (2) "future goods." The threefold division of Bell is in some respects to be preferred, viz. (1) specific goods, (2) goods described generically, (3) future goods.¹ The first of these Bell calls a "*proper sale*," i.e. one which, according to the former law of Scotland, passed the risk though not the property to the buyer.²

Goods to be
manufactured.

The bill originally provided that in the case of goods sold "by a manufacturer as such there is (in the absence of any trade usage to the contrary) an implied undertaking that the goods are of the seller's own manufacture." This gave effect to the English case of *Johnson v. Raylton*³ (1881), and was in opposition to the Scottish cases of *West Stockton Iron Co. v. Neilson and Maxwell*⁴ (1880) and *Johnson and Reay v. Nicoll and Son*⁵ (1881). The sub-

¹ Bell's *Prin.*, Sect. 90.

² *Ibid.*, Sect. 91.

³ 7 Q.B.D. 488.

⁴ 7 Ret. 1055.

⁵ 8 Ret. 437. See also *Taylor v. Maclellans* (1891), 19 Ret. 10.

section embodying this provision was deleted in committee, **Sect. 5.** so that, taken in connection with **Sect. 14 (1)**, the Scottish rule is now the law of both countries.¹

The *res* or subject of sale may be physical and tangible, Contingency. or it may be an incorporeal right, such as a debt or a share in a joint-stock company. The Act relates only to the former of these.² It is possible, however, that the subject of sale may in Scotland be treated as an incorporeal right beyond the scope of the Act, while in England it is a "chattel personal"³ falling within its provisions. Thus the validity of the sale of a *spes* or chance is recognised in Scotland⁴ as well as in England,⁵ but in Scotland the *spes*, though incorporeal, is *itself* the subject of the sale. It is an absolute sale of an incorporeal thing,⁶ the price of which is payable although the chance itself should never be realised. A *spes* not being a "corporeal moveable" does not come within the category of "goods" as defined in **Sect. 62 (1)**, and therefore the sale of a *spes* is not controlled by the Act. In England, on the other hand, the transaction is treated as a conditional or contingent sale of the *subject* of the *spes*, which may or may not be a corporeal moveable. "A mere possibility or contingency, not dependent upon any present right nor resulting from any present property or interest . . . may be the subject of an executory agreement to sell."⁷ But being an *executory* agreement it necessarily relates not to the *spes* but to its subject. If one sold a chance as such, he would transfer at

¹ See as to the former law of England—Benjamin on *Sale*, p. 658. It has been suggested that the evident intention of the framers of the Act has not been carried out. The subject is again referred to *post*, p. 65.

² "'Goods' include, in Scotland, all corporeal moveables except money," **Sect. 62 (1)**.

³ **Sect. 62 (1)**.

⁴ *Ersk.* iii. 3. 3. But a *spes* does not vest in a trustee in bankruptcy, and even a future right, though much more than a *spes*, does not do so.—*Reid v. Morrison* (1893), 20 *Ret.* 510. See also *Trappes v. Meredith* (1871), 10 *Macp.* 38.

⁵ Benjamin on *Sale*, 87; Story on *Sale*, **Sect. 185**; *Hitchcock v. Giddings* (1817), 4 *Price* 135, per Richards C. B. at p. 139; *Buddle v. Green* (1857), 27 *L.J. Ex.* 33, per Martin, B., at p. 34.

⁶ "A chance is a *res* in the wide jural sense of the word, quite as much as a claim of debt or other incorporeal is."—Mackintosh on *Roman Law of Sale*, p. 25.

⁷ Story on *Sale*, **Sect. 186**; Benjamin on *Sale*, p. 87.

Sect. 5.

once to the purchaser all his property and interest in it, and therefore if the transaction had related to "goods" it would have been a "sale" as distinguished from an "agreement to sell." English law, however, declares that the present sale of a chance is impossible,¹ and that the transaction is an executory agreement to sell something else, contingently upon that other thing coming into existence.² If that other thing is a corporeal moveable or "chattel personal" the Act will apply.³ It therefore follows that in Scotland the Act will not apply to the sale of a *spes* or chance, while in England a sale exactly similar in its nature may fall to be dealt with under its provisions.

*Emptio rei
operatæ.*

In the case of *emptio rei operatæ*, i.e. where the thing sold "may be reasonably expected to come into existence in the ordinary course of nature, e.g. the lambs to be born in the following spring on a particular sheep run, or next season's yield from a certain farm, garden, or vineyard,"⁴ the law of England somewhat inconsistently holds it to be a "bargain and sale," so that immediately on the thing coming into existence the property and the risk pass at once to the purchaser.⁵ It seems, however, that this rule has never been acted upon, and it has been very properly suggested that "there is no rational distinction between one class of future goods and another."⁶

Future goods.

In regard to "future goods" as defined in this section and in Sect. 62 (1), there is no foundation for the statement of Bell that in England "no action would lie if the seller had not the goods at the time but intended to go

¹ "A contingency cannot be made the subject of a present sale."—Story on *Sale*, Sect. 186.

² "Such a contract" (i.e. a contract for the sale of chance) "would not be a bargain and sale at common law, but would be a valid executory contract."—Benjamin on *Sale*, p. 87.

³ Sect. 62 (1).

⁴ Moyle's *Sale in the Civil Law*, p. 31.

⁵ "Things not yet existing which may be sold are those which are said to have a potential existence, that is things which are the natural product or expected increase of something already belonging to the vendor."—Benjamin on *Sale*, p. 82. See on the subject generally *Wood v. Foster* (1587), 1 Leon 42; *Grantham v. Hawley* (1615), Hob 182; *Robinson v. Macdonell* (1816), 5 M. & S. 228; *Hale v. Rawson* (1858), 4 C.B. N.S. 85.

⁶ Chalmers, *Sale of Goods Act*, p. 16. This view is supported by *Langton v. Higgins* (1859), 4 H. & N. 402, and perhaps also by *Howell v. Coupland* (1874), 1 Q.B.D. 258.

into the market and buy them.”¹ The case of *Bryan v. Lewis*² (1826) upon which he founds, and also the earlier case of *Lorymer v. Smith*³ (1822), were judgments of Lord Tenterden (Abbot, C. J.), who thought such a transaction a wager and therefore illegal.⁴ In the later case of *Hibblewhite v. M'Morine*⁵ (1839) the cases referred to were clearly overruled.⁶

But though “future goods” may form the subject of an agreement to sell they cannot be made the subject of a sale so as to pass the property.⁷ In this respect, therefore, the section is merely declaratory of the common law of England.

6. Where there is a contract for the sale of specific goods,^(a) and the goods without the knowledge of the seller^(b) have perished^(c) at the time when the contract is made,^(d) the contract is void.^(e)

Sect. 6.
GOODS WHICH
HAVE
PERISHED.

NOTES.

(a) “*Specific goods.*” Defined Sect. 62 (1). The section does not apply to goods described generically. *Genus nunquam perit.*

(b) “*Without the knowledge of the seller.*” See COM. *infra*, p. 32.

(c) “*Perished.*” Altered in committee from “*ceased to exist.*” The latter phrase is the one usually employed in the decisions, e.g. in *Couturier v. Hastie*⁸ (1856).

(d) “*At the time when the contract is made.*” Sect. 7 deals with the case of goods perishing *after* the contract, but before the risk passes to the buyer.

¹ Bell on *Sale*, p. 16. Bell's work on *Sale* was written in 1843, but he appears not to have noticed *Hibblewhite v. M'Morine* decided four years earlier.

² Ry. and Moo. 386.

³ 1 B. & C. 1.

⁴ “The strong opinion Lord Tenterden expressed appears to have been gradually formed in his mind, and was no doubt confirmed by the effects of the unfortunate mercantile speculations throughout the country about that time.”—Per Parke, B., on *Hibblewhite v. M'Morine* (1839), 5 M. & W. 452 at p. 462.

⁵ 5 M. & W. 452.

⁶ Bell himself throws doubt upon *Bryan v. Lewis*.—Bell's *Prin.*, Sect. 128, note.

⁷ *Lunn v. Thornton* (1845), 3 C.B. 379, where a contrary argument was negatived by the Court. See also *Langton v. Higgins* (1859), 28 L.J. Ex. 252; *Moakes v. Nicholson* (1865), 19 C.B. N.S. 290; Benjamin on *Sale*, p. 361.

⁸ 7 H.L. Cas. 673.

Sect. 6.

(e) "*Void*." The word corresponds to the Scottish "*null ab initio*." See NOTE (a), Sect. 23 *post*, p. 114.

COMMENTARY.

Couturier v. Hastie.

This section is founded on *Couturier v. Hastie*¹ (1856), where a sale of corn at sea was contracted in London, but it was afterwards found that the cargo, having got heated, had been sold at a foreign port before the date of the contract. A court of seven judges, and afterwards the House of Lords, unanimously found the London contract void, holding, in the words of Lord Chancellor Cranworth, that "what the parties contemplated was an existing something to be sold and bought." The case further shows that it is not essential to the application of the rule that the goods perish physically, if they cease to answer the description in the contract. The corn continued to be called by that name, but it was no longer the specific cargo intended by the parties.

Knowledge of parties.

Knowledge on the part of the seller that the goods he professes to sell have perished will very properly subject him to a claim for damages. The contract in that case is not void in the sense of freeing both parties. The section, however, does not refer to the *buyer's* knowledge, or state what the effect would be in the event of the subject of sale having only partially perished. The rule of the Roman law was that in the case of partial loss, if the buyer knew and the seller did not, the sale was good, and the buyer was obliged to pay the full price,² while in the event of total loss the sale was altogether void.³ There seems no room here for a similar distinction.

Partial loss.

When the goods sold have partially perished the only question seems to be, whether the subject of sale continues to answer the description in the contract. If not, it ceases to be the specific article sold.⁴ Pothier thought that in

¹ 7 H.L. Cas. 673.

² *Digest*, 18. 1. 57.

³ *Ibid.* 18. 1. 15. pr. But see Mackintosh's *Roman Law of Sale*, p. 106, where it is suggested that the rule as to partial loss extended to total loss.

⁴ This may be deduced from the converse proposition that if the thing sold continues to answer the description, the sale is good. In *Barr v. Gibson* (1838), 3 M. & W. 390, a ship sold while at sea had, previous to the contract, and unknown to the parties, been stranded. It was held that the

every case of partial destruction the buyer should have the option of either abandoning the sale, or of claiming the part preserved at a reduced price,¹ but this suggestion, though adopted in France and embodied in the French Code,² forms no part of the law of England³ or Scotland.⁴ Impossibility of performance is probably the true basis upon which the avoidance of the contract proceeds, but impossibility is not removed by a part remaining possible, nor can fulfilment of a part of a contract be said to be the fulfilment of the contract itself. If performance is impossible, the fact should operate in favour of an innocent seller as well as in favour of a buyer; both parties should be bound or neither.

Sect. 6.

Impossibility of performance.

A difficulty may be suggested where specific goods, subject to two or more contracts of sale, are found to have been partially destroyed. If, for instance, the seller has

Partial destruction where two or more contracts.

subject of sale was still extant as a ship, though it might be a total loss in the sense of an insurance policy. In certain circumstances the buyer may be bound to communicate to the seller the benefit of an insurance effected by him—*Gillespie v. Miller, Son, and Co.* (1874), 1 Ret. 423.

¹ Contract de Vente, No. 4.

² Art. 1601.

³ Chalmers on *Sale of Goods Act*, p. 17.

⁴ So far as sale is concerned, no very direct authority either in England or Scotland can be cited for the non-application of the French rule, though an analogy may be found in the law as to leases—Pollock on *Contract*, 6th ed. p. 393; Stair, i. 15. 2 and 3; Ersk. ii. 6. 41; Bell's *Prin.* Sect. 1208. In *England Barr v. Gibson* (1838), 3 M. & W. 390, is sometimes cited as authority, but is not directly in point. Perhaps *Geipel v. Smith* (1872), L.R. 7 Q.B. 404, is a better illustration. While it related to an excepted risk in maritime law, the principle seems of general application. It was held that where the principal part of a contract becomes impossible by an excepted risk, the parties (*i.e.* both parties) are discharged from performing any other part which remains possible. (See Pollock on *Contract*, 6th ed. pp. 404, 408.) The leading American text-writers are, however, inclined to adopt the French rule as applicable both to England and Scotland. Kent, referring to Pothier and the Code Napoleon, says: "I presume the principles contained in the English and American cases tend to the same conclusion, provided the inducement to the purchase be thereby materially affected" (*Com.* ii. 469). Story says: "If the thing sold be only partially destroyed at the time of the sale, the buyer may either abandon the contract or he may take the thing at a proportional reduction of the price, according to the terms of the original bargain" (*Sale*, Sect. 184). Two English decisions are cited as authority by both authors, but neither supports the law as stated. *Curtis v. Hannay* (1800), 3 Esp. 82, merely illustrates the well-recognised English rule as to warranty set forth in Sect. 11 of this Act, while *Farrer v. Nightingal* (1798), 2 Esp. 639, if it has any relation to this subject, is adverse to the proposition set forth. Story further states that the law of Scotland is the same as that of the Code Napoleon, and cites M. P. Brown on *Sale*, Sect. 134, but Brown merely sets forth the Roman law, adding in a note that "the rule now adopted in France seems conformable to equity."

Sect. 6. 100 boxes of raisins in a particular warehouse, 50 of which he sells to A and 50 to B without definite apportionment, if it turns out that 40 out of the 100 have perished, is the seller free from both contracts or either of them? Analogy points to both contracts being void, though each separately is capable of fulfilment. The further question, however, arises, whether, in the case supposed, the goods are really specific so as to come within this section.

Sect. 7. 7. Where there is an agreement to sell^(a) specific goods,^(b) and subsequently the goods, without any fault^(c) on the part of the seller or buyer, perish before the risk passes to the buyer,^(d) the agreement is thereby avoided.^(e)

GOODS PERISH-
ING BEFORE
SALE BUT
AFTER AGREE-
MENT TO SELL.

NOTES.

- (a) "*Agreement to sell.*" Defined Sect. 1 (3).
- (b) "*Specific goods,*" i.e. "goods identified and agreed upon at the time a contract of sale is made." Sect. 62 (1).
- (c) "*Fault*" means wrongful act or default. Sect. 62 (1).
- (d) "*Before the risk passes the buyer.*" Compare Sect. 1 (4) with Sect. 20, and see Sect. 18, Rules 2 and 3.
- (e) "*Avoided,*" i.e. becomes or is made void. The Scottish term "reduced" is analogous, but it implies a formal decree of a Court. See NOTE (a), Sect. 23 *post*, p. 114.

COMMENTARY.

The rule here, as in the previous section, applies only to *specific* goods. In Sect. 6 the goods were the subject of a "*sale*" under which, had they not previously perished, both property and risk would have passed to the purchaser; here, the goods, though specific, are subject only to an "*agreement to sell,*" under which the risk has not passed.

The section will apply to the cases specified in Sect. 18, Rules 2 and 3, and also to any case where the parties have agreed to alter the *prima facie* rule by postponing the passing of the risk.

It will be observed that, although the word "*sale*" is

inadvertently used in the rubric, it is not the sale but the passing of the risk which forms the *terminus ad quem* of the rule. A "sale" implies that the property has passed,¹ but, though *prima facie* the property and the risk pass together, the conjunction is not essential and may be altered by agreement.² Sect. 7.

The leading case upon which the rule of this section is founded is that of *Howell v. Coupland*³ (1874), where the subject of sale was 200 tons of a special class of potatoes, grown on particular lands. The potatoes having afterwards suffered from blight, so that the seller was only able to deliver 80 tons, he was held to be under no obligation as to the remainder. This judgment was founded on *Taylor v. Caldwell*⁴ (1863), where an important general principle was laid down in these words: "In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."⁵

The Price.

8.—(1.) The price^(a) in a contract of sale^(b) may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing^(c) between the parties. Sect. 8.
ASCERTAIN-
MENT OF PRICE.

(2.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price.^(d) What is a reasonable price is a question of fact dependent on the circumstances of each particular case.^(e)

¹ Sect. 1 (3).

² Sect. 20.

³ L.R. 9 Q.B. 462, 1 Q.B. Div. 258.

⁴ 3 B. & S. 826.

⁵ 3 B. & S. at p. 839.—Per Blackburn, J. As to the effect of the subject of sale having only partially perished, see COM., Sect. 6, *ante*, p. 32.

Sect. 8.

NOTES.

(a) "*Price.*" The price must be in money. It is defined in Sect. 1 (1) as a "*money consideration.*" Payment of the price and delivery are concurrent conditions, Sect. 28. As to the effect of the Act upon barter in England and Scotland respectively, see COM. *infra*, p. 39.

(b) "*Contract of sale.*" Defined Sects. 1 (1) and 62 (1).

(c) "*Course of dealing.*" This is usage between the parties, but not "*usage of trade.*" The latter may, however, be implied. See Sect. 55 and COM. *infra*, p. 258.

(d) "*Reasonable price.*" The current price at the port of shipment may be exceptional, and therefore not reasonable. See *Acebal v. Levy*¹ (1834). The law of Scotland seems to be altered by this sub-section. COM. *infra*.

(e) If a rate has been fixed, but the exact amount cannot be ascertained in consequence of the goods having perished, the Court or the jury may make a reasonable estimate.²

COMMENTARY.

Ascertainment
of price.

The price may be ascertained in three different ways: (1) fixed by the contract; (2) fixed in manner specified in the contract³; (3) determined by usage between the parties. Failing all of these, the buyer must pay a reasonable price.

Differences
between
English and
Scottish law
as to reason-
able price.

The section is declaratory of the law of England, but, in so far as it admits of the fixing of a reasonable price, it seems to alter the common law of Scotland. The law of England admitting the validity of a sale, where the price is not stated, and recognising a reasonable price, was settled by *Acebal v. Levy*⁴ (1834), and was extended to executory contracts by *Hoadley v. M'Laine*⁵ (1834). In Roman law there could be no sale without a definite price fixed by the contract, or in some mode provided by the contract. "Until

¹ 10 Bing. 376.

² *Martineau v. Kitching* (1872), L.R. 7 Q.B. 436.—Per Lord Blackburn at p. 456.

³ For example, by valuation, as to which special rules are enacted by Sect. 9.

⁴ 10 Bing. 376. See also *Valpy v. Gibson* (1847), 4 C.B. 837, especially the remarks of Wylde, C. J., at p. 864.

⁵ 10 Bing. 482. See also *Joyce v. Swann* (1864), 17 C.B. N.S. 84, per Erle, C. J., at p. 93. It may, however, be of the essence of the bargain that the price be determined by the contract itself, in which case there is no binding agreement until it is fixed—*Page v. Norfolk* (1894), 70 L.T. N.S. 781.

so fixed there was no obligation, and therefore no contract.”¹ This rule of the Roman law has been adopted in Scotland, hence all our Institutional writers describe a price *certain* as an essential of sale.² It is true that if the sale had been “executed,” *i.e.* if delivery had taken place, the buyer was obliged to pay the market price of the goods actually received by him.³ This, however, was not due to agreement, but to the fact that something had followed on the supposed contract which could not be undone.⁴ The party receiving the benefit was in equity bound to recompense the other at the market rate, but he had no obligation in regard to any part of the goods not delivered.⁵ The same principle held where there was mutual error regarding the price. The purchaser was bound to pay the market value of the goods, but only in so far as *res non integræ*.⁶

¹ Moyle, *Sale in the Civil Law*, p. 68; Mackintosh, *Roman Law of Sale*, p. 23; Dig. 45. 1. 75 and 18. 1. 7. 1 and 2; *Inst.* iii. 23. 1; Benjamin on *Sale*, p. 376; Blackburn on *Sale*, p. 242. “Contracts of a kind with which we are so familiar, as where one goes to a shop and gets goods on credit without asking the price, or directs a shopkeeper to make one an article of a particular description without asking what it will cost, are in the Civil Law not contracts of sale at all, but innominate: the tradesman who supplies the goods, or who makes and delivers the article which has been ordered, sues for a money compensation not by *actio ex vendito*, but by *actio præscriptis verbis*.”—Moyle, *supra*, p. 69.

² Stair, i. 14. 1; Mackenzie, iii. 3. 1; Bankton, i. 19. 3; Ersk. iii. 3. 4; Bell's *Com.* i. 461; Bell's *Prin.*, Sect. 92; Bell on *Sale*, p. 18. The same holds in France, Civil Code, Art. 1591.

³ *Leslie v. Miller* (1714), M. 14197; *Bertrams v. Barry* (1818), 1 Mur. 348; *Wilson v. M. Breadalbane* (1859), 21 D. 957; *Stuart and Co. v. Kennedy* (1885), 13 Ret. 221; *Malloch v. Hodgton* (1849), 12 D. 215; *Cuthbertson v. Loves* (1870), 8 Macp. 1078. Where invoices stating a price were sent with the goods and the price was not timeously challenged, it was held fixed though above the market rate.—*Mills v. Hamilton* (1830), 9 Sh. 111.

⁴ Per Lord President Inglis in *Stuart and Co. v. Kennedy* (1885), 13 Ret. at p. 223.

⁵ It is not easy to reconcile the theory of no contract with the common case of goods bought in a shop on credit without price stated, especially if there had been a previous course of dealing between the parties. Such a transaction would probably have been recognised as binding in Scotland as well as in England, although the goods had not been actually carried away by the buyer. It is also to be observed that where recourse was had to the market price, it was the market price at the date of the supposed contract, not at the date of the delivery of the goods—*Malloch v. Hodgton* (1849), 12 D. 215; *Champion v. Milne* (14th January 1811), F.C. The inconsistency is no doubt due to the influence of English law, and may be noticed elsewhere, *e.g.* in Bell on *Sale*, p. 19.

⁶ *Sword v. Sinclair* (1771), Mor. 14241; *Wilson v. M. Breadalbane* (1859), 21 D. 957; *Stuart and Co. v. Kennedy* (1885), 13 Ret. 221. In *Anderson v. Wilson* (1856), 19 D. 39, the executors of a deceased seller sued for the price as it appeared in deceased's books, and refused delivery at a less price alleged

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We thus find that previous to the passing of this Act the rules of English and Scottish law as to price differed in principle as regards executed contracts, and were wholly different where the contract was executory. Now, however, the Scottish law has been assimilated to that of England.

Price ascer-
tained by
arbitration,
etc.

In Scots law, so long as the contract provided a means of fixing the price, the requirement of a certain price was satisfied:¹ there is therefore no change in this respect. The price may be left to the decision of arbiters,² or may be fixed by some public standard,³ or may even be left to the decision of one of the parties.⁴ The price may be alternative, and made to depend on some extraneous event,⁵ or it may be agreed to be fixed by the result of an examination of books,⁶ or it may be left to be fixed by weight, or measurement, or test.⁷

Course of
dealing.

The "course of dealing between the parties" may be quite special, and has no necessary connection with usage of trade. Trade usage may, however, be implied, so as to fix the price or the mode of payment,⁸ as where a particular trade allows a discount in respect of settlement when due. In some trades a large proportion of the price is thus discounted; but this is not a proper trade discount, and if the

by the buyer to be the price arranged. In the course of the proceedings the pursuers lodged a minute accepting the price named by the buyer, but it was held that the previous refusal to deliver was a breach of contract entitling the buyer to rescind. The case seems one of mutual error as to price, which, as the law then stood, might have justified a finding of no contract; but the existence of a contract is assumed.

¹ *E.g.* the same price "as such a person gave or as shall be had from others by the seller for the like goods, or as such a person shall appoint."—*Stair*, i. 14. 1.

² *E. Selkirk v. Nasmith* (1778), Mor. 627. But the reference may be such as to be a mere wager, and therefore illegal—*Brogden v. Marriott* (1836), 3 Bing. N.C. 88; *Rourke v. Short* (1856), 5 El. & Bl. 904.

³ Such as fairs prices, *Treas. of Aberdeen v. Gordon* (1760), Mor. 4415; or the lowest market price of the day—*Champion v. Milne* (14th January 1811), F.C.

⁴ *E. Montrose v. Scott* (1639), Mor. 14155; *Steven v. Robertson* (1760), Mor. 3158; *Lavaggi v. Pirie and Sons* (1872), 10 Macp. 312. See Com., Sect. 9 *post*, p. 43.

⁵ *Smith v. Brown* (1735), Elchies, Sale, No. 1.

⁶ *E.g.* in *Edinburgh United Breweries, Limited, v. Nicholson's Trustees* (1893), 20 Ret. 581, Affd. (1894), 21 Ret. H.L. 10.

⁷ As in *Hansen v. Craig and Rose* (1859), 21 D. 432. See Sect. 18, Rule 3.

⁸ See Sect. 55; also *Stewart v. Gordon* (1831), 9 Sh. 466; *Athya and Co. v. Rowell and Co.* (1856), 18 D. 1299; *Bell's Com.* i. 465; *Bell's Prin.*, Sect. 101.

seller requires to raise action he is under no obligation to Sect. 8.
allow the reduction.¹

Mere inadequacy of price without fraud will not avoid the sale.² Nor is the remedy of the later Roman law available to the seller so as to enable him to rescind the contract where less than half the real value has been given.³ Inadequacy of price.

The price must be in the form of money, otherwise the contract is barter or exchange and not sale. The Bill originally had a section explanatory of "exchange" and providing for the application of the Act to that contract subject to any necessary modifications, but this clause was deleted in Committee, and we are left to infer that the Act does not apply to exchange.⁴ Where, however, the consideration for the transfer of goods is partly money and partly other goods, the contract is deemed to be one of sale and not of exchange.⁵ Act does not apply to exchange.

In Scotland the distinction between sale and barter is perhaps of greater importance than in England. The Scottish law follows more closely that of Rome, where sale was a consensual, while barter was a real, contract. Three important distinctions operated in Roman law,⁶ but of these only one is capable of being applied to Scotland. It may be expressed thus. In sale the risk passed to the buyer Barter in Scottish law. Passing of the risk.

¹ *Duncan v. Aitchison and Co.* (1879), 6 Ret. 582.

² Ersk. iii. 8. 4; M. P. Brown on *Sale*, pp. 147, 148; *Fairie v. Inglis* (1669), Mor. 14231; *Latta v. Park and Co.* (1865), 3 Macp. 508. In *Dawson v. Muir* (1851), 13 D. 843, vats were sold by auction for £2 and were afterwards discovered to contain white lead valued at £300. The sale was sustained. The "consideration" which English law requires in order to validate a simple contract is not recognised in the law of Scotland, and even in England it does not affect the question of adequacy, for the consideration may be quite illusory. See Appendix III. *post*, p. 341.

³ This was enacted by Diocletian and Maximian, A.D. 285, Cod. 4. 44. 2; Moyle, p. 75. It was pleaded but not sustained in the Scottish case, *Fairie v. Inglis* (1669), Mor. 14231.

⁴ The question as to whether there is any difference in principle between sale and exchange gave rise to a long controversy between the Sabinian and Proculian schools (Benjamin on *Sale*, pp. 1, 2, note). The modern law on the subject is elaborately discussed by an American writer, who argues that the difference is merely nominal.—Travis on *Sale* (1892), vol. i. pp. 1, 32.

⁵ Chalmers on *Sale of Goods* (1890), p. 87, and cases there cited. It was so in the Civil Law (Dig. 19, 1. 6. 1). Where some article was given in addition to money, it was in old times called "to boot" or "to the bargain," e.g. in *Fairie v. Inglis* (1669), M. 14231, and *Morrison v. Glen* (1712), M. 14286.

⁶ Moyle, *Sale in the Civil Law*, p. 5.

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Differences of opinion as to effect of barter.

Effect upon law of Scotland of exclusion of exchange from the Act.

Effect of payment of the price upon the passing of the property.

from the date of the contract without regard to delivery: in barter, if one party conveyed and the other was unable to do so on account of the subject having perished, the former was entitled to get his property back. It is possible that this distinction holds in Scots law, though no direct authority can be cited. Erskine indeed states expressly that "the nature of both contracts, and the obligations on the contractors, are in effect the same"¹; and further, that barter "is by our practice fully perfected by consent alone without any *interventus rei*."² In the opinion of M. P. Brown these *dicta* are inaccurate, Erskine himself "having stated a very important distinction between sale and exchange."³ Bell in turn expresses dissent from M. P. Brown's criticism on the ground that he proceeds on a distinction peculiar to excambion of land.⁴ It will be observed, however, that, granting the illustration as to excambion of land to be valueless, the question as to the passing of the risk is not touched by any of the writers mentioned. It may therefore be suggested that the exclusion of exchange from the operation of this Act is of importance in Scotland. An executory barter may be possible,⁵ yet it does not follow that either property or risk will pass before delivery.

In Roman law the passing of the property followed, not from the contract as in England, nor even from delivery as in Scotland, but from payment of the price, so that, unless credit were expressly given, delivery to the buyer did not make him owner if the price remained due.⁶ This rule had no place in the law of Scotland, but it may have contributed to a misconception on the part of some Scottish writers. Thus Bell makes payment of the price the test in certain cases of constructive delivery,⁷ and Lord Ivory, in

¹ Ersk. iii. 3. 4.

² Ersk. iii. 3. 13.

³ M. P. Brown on *Sale*, p. 151, referring to Ersk. ii. 3. 28.

⁴ Bell's *Prin.*, Sect. 92, note (m).

⁵ Its validity as a contract is expressly stated by Stair. "Though neither of the things exchanged be delivered, the agreement is valid."—Stair, i. 14. 1.

⁶ *Inst.* ii. 1. 41; Dig. 14. 4. 5. 18; Dig. 18. 1. 19 and 53; Moyle, p. 145; Mackintosh, p. 41; Bell's *Com.* i. 257.

⁷ Bell's *Com.* i. 177, note; i. 217; i. 224, note. In the last of these passages Bell enters into a detailed criticism of the supposed principle, but proceeds upon a mistaken view of stoppage *in transitu*, which is corrected by

his notes to Erskine, falls into a similar error.¹ There is nothing, however, to prevent a special agreement such as that of hire-purchase, under which, notwithstanding delivery, the property is not to pass to the purchaser until the price is paid.² **Sect. 8.**

Payment of the price must be made by legal tender if such be insisted on. Legal tender in Scotland is confined to coinage, viz gold for a payment of any amount; silver for a payment not exceeding forty shillings; bronze for a payment not exceeding one shilling.³ But an objection to tender of payment in any commonly recognised currency, such as Scotch bank notes in Scotland, will not be looked upon with favour by the courts.⁴ **Legal tender.**

Where payment is made under a condition either expressly or tacitly acquiesced in by the seller, the condition must receive effect. Thus where a cheque was enclosed in a letter requesting in return a guarantee in regard to delivery of the goods, the receiver, having cashed the cheque but refused the guarantee, was held liable in repayment.⁵ **Conditional payment.**

Proof of payment of the price differs in England and Scotland. Written or oral evidence may be offered in England, but in Scotland only written evidence is allowed, except in case of ready money, or where the amount is under £8 : 6 : 8. The Mercantile Law Commission of 1855 recommended that the law of Scotland in this respect should be assimilated to that of England,⁶ but the recommendation did not receive statutory effect in the Act of 1856.⁷ **Proof of payment.**

9.—(1.) Where there is an agreement to sell ^(a) goods on the terms that the price is to be fixed by the **Sect. 9.**
AGREEMENT TO SELL AT VALUATION.

his editor (Bell's *Com.*, 7th ed. i. p. 217, note). Elsewhere Bell says: "Nothing is better fixed than that payment of the price has no effect whatever on the transfer of the property"—*Com.* i. 192, note.

¹ *Ersk.* (Ivory's ed.), p. 645, note.

² See as to hire-purchase, *Com.*, Sect. 17 *post*, p. 83.

³ Coinage Act 1870, 33 Vict. c. 10, Sect. 4. Bank notes of Scotch Banks are not a legal tender, and Bank of England notes, although a legal tender in England, are not so in Scotland (8 & 9 Vict. c. 38, Sect. 15).

⁴ See in England *Polglass v. Oliver* (1831), 2 Cr. & J. 15, and other cases cited by Benjamin, *Sale*, p. 423.

⁵ *Seemple v. Wilson* (1889), 16 Ret. 790.

⁶ 2nd Report, p. 7.

⁷ 19 & 20 Vict. c. 60.

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valuation of a third party,^(a) and such third party cannot or does not make such valuation, the agreement is avoided;^(c) provided that if the goods or any part thereof have been delivered to and appropriated^(d) by the buyer he must pay a reasonable price^(e) therefor.

(2.) Where such third party is prevented from making the valuation by the fault^(f) of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.^(g)

NOTES.

(a) "*Agreement to sell.*" Defined Sect. 1 (3).

(b) "*Valuation of a third party.*" In Scotland the price may even be left to the determination of one of the parties themselves. COM. *infra*, p. 43.

(c) "If the persons appointed as valuers fail or refuse to act, there is no contract in the case of an *executory* agreement, even though one of the parties should himself be the cause of preventing the valuation."¹ But the second sub-section gives a remedy in the form of damages. COM. *infra*, p. 43.

(d) "*Appropriated*" here seems equivalent to "*accepted.*" See Sect. 35.

(e) "*Reasonable Price.*" See Sect. 8 (2).

(f) "'*Fault,*' i.e. wrongful act or default," Sect. 62 (1). See also Sects. 7 and 20.

(g) "Where parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it . . . each agrees to do all that is necessary on his part for the carrying out of that thing."²

COMMENTARY.

This section is supplementary to Sect. 8, which declares that the price may be left to be fixed in manner agreed upon in the contract. The rule as stated is that of the

¹ Benjamin on *Sale*, p. 90.

² Per Lord Blackburn in *Mackay v. Dick and Stevenson* (1881), 8 Ret. H.L. 37 at p. 40.

Civil law and of the law of Scotland, except in so far as (failing a price being fixed) it imports a reasonable price, and after delivery imputes payment to contract rather than to recompense or *quantum meruit*.¹ The law of Scotland, however, goes further than the Roman law,² and permits not merely a valuation by a third party such as this section contemplates, but a reference of the amount of the price to one of the contracting parties.³ Where the price has been referred to a third party, the death of one of the parties to the contract before the referee has fixed the price, will not avoid the agreement.⁴

Sect. 9.

Reference to one of the parties.

Effect of death of third party.

The first sub-section is declaratory of English law,⁵ but where the valuation had been prevented by the fault of seller or buyer the law previous to the Act was doubtful. In *Thurnell v. Balbirnie* ⁶ (1837) the law was assumed to be as now stated, though the point did not arise for decision. On the other hand, in *Vickers v. Vickers* ⁷ (1867), Page-Wood, V.C., refused specific performance on the ground that there was "no existing contract," a reason which would equally prevent a claim for damages.

Fault of seller or buyer.

If an arbiter accept office he cannot refuse to proceed to a final determination,⁸ and in England a valuer in such circumstances will be held liable in damages.⁹

Arbiter's refusal to proceed.

¹ *Inst.* iii. 24. 1; *Dig.* 18. 1. 15. 1; *Ersk.* iii. 3. 4: *M. P. Brown on Sale*, p. 148 *et seq.* See also *Com.*, Sect. 8, *supra*, p. 37.

² *Moyle, Sale in Civil Law*, p. 69; *Mackintosh, Roman Law of Sale*, p. 71; *Dig.* 18. 1. 35. 1.; *Cod.* 4. 38. 18.

³ *Steven v. Robertson* (1760), *Mor.* 3158 (seller); *E. Montrose v. Scott* (1639), *Mor.* 14155 (buyer); *Lavaggi v. Pirie and Sons* (1872), 10 *Macp.* 312 (buyer). See also *Graham and Co. v. Pollock and Caldwell* (1763), *Mor.* 14198.—*Stair*, i. 14. 1; *Ersk.* iii. 3. 4; *Bell's Prin.*, Sect. 92; *M. P. Brown on Sale*, p. 150. All these text-writers state or assume that the price so fixed is not absolute, but subject to correction by a judge, and *Stair* extends the same rule to any reference of the price to a third party. In either case, however, it is difficult to see how a judge could interfere unless upon a formal reduction of the award, as in the case of an ordinary reference. As to English law on this subject, see *Haule v. Hemyng* (1617), *Cro. Jac.* 432, cited in *Vyse v. Wakefield* (1840), 6 *M. & W.* 442, 454; *Holmes v. Twist*, (1614), *Hob.* 51, cited in *Makin v. Watkinson* (1870), *L.R.* 6 *Ex.* 25, 29.

⁴ *E. Selkirk v. Nasmith* (1778), *M.* 627.

⁵ *Ess v. Truscott* (1837), 2 *M. & W.* 385; *Clarke v. Westrope* (1856), 18 *C.B.* 765.

⁶ 2 *M. & W.* 786.

⁷ *L.R.* 4 *Eq.* 529.

⁸ *Edin. and Glas. Ry. Co. v. Marshall* (1853), 15 *D.* 603.

⁹ *Jenkins v. Beetham* (1854), 15 *C.B.* 189; *Cooper v. Shuttleworth* (1856), 25 *L.J. Ex.* 114.

Sect. 9.*Quantum meruit.*

Although the agreement is avoided under the first subsection, the buyer, if he has received and retained or used the goods, will be liable upon a *quantum meruit*.¹

*Conditions and Warranties.***Sect. 10.**STIPULATIONS
AS TO TIME.

10.—(1.) Unless a different intention^(a) appears from the terms of the contract, stipulations^(b) as to time of payment are not deemed to be of the essence^(c) of a contract of sale.^(d) Whether any other stipulation as to time is of the essence^(c) of the contract or not depends on the terms of the contract.

(2.) In a contract of sale “month” means *prima facie* calendar month.^(e)

NOTES.

(a) “*Different intention.*” *E.g.* the seller may stipulate a right of re-sale on the buyer’s default, which right, if exercised, rescinds the contract [Sect. 48 (4)].

(b) “*Stipulations.*” This word is used to include both “conditions” and “warranties.” “A stipulation may be a condition though called a warranty” [Sect. 11 (1) (b)].

(c) “*Essence.*” Any stipulation which is of the essence of a contract of sale is a “condition”; if it is not of the essence of the contract it is a “warranty.” See definition of “warranty” [Sect. 62 (1)].

(d) “*Contract of sale.*” Defined Sects. 1 (1) and 62 (1).

(e) “*Calendar month.*” So also in Bills of Exchange Act 1882² [Sect. 14 (4)]. In all Acts, unless the contrary intention appears, “month” means “calendar month.”³

COMMENTARY.

Conditions.

The remainder of Part I. (Sects. 10 to 15 inclusive) deals with conditions and warranties. A condition (*i.e.* a suspensive condition or condition precedent) is a stipulation

¹ *Clarke v. Westrope* (1856), 18 C.B. 765.² 45 & 46 Vict. c. 61.³ 52 & 53 Vict. c. 63, Sect. 3.

Sect. 10.

which goes to the essence of a contract, so that non-fulfilment either avoids the contract or makes it voidable in the option of one of the parties. In the former case the contract itself is conditional,¹ so that if the condition is not fulfilled both parties are free from obligation.² In the latter case the condition is one (not impossible in itself³), the non-fulfilment of which by one of the parties constitutes a breach of contract by him.⁴ In the event of such a breach, the other party may either repudiate or maintain the contract, and if he repudiate he is not only free from his counter obligation, but he may obtain damages in respect of the breach.⁵ By the former law of Scotland, if the party not in fault desired to maintain the contract, he was excluded from any claim of damages. It was a pre-requisite to such a claim that the contract should be repudiated and annulled, and both parties placed as far as possible in the same position as if it had never been entered into. Now, however, the buyer has an alternative remedy against the seller, who is in breach of a condition. If the goods are offered for delivery he is entitled as formerly to reject them and repudiate the contract, or he may accept the goods and maintain the contract without depriving himself of his

¹ Com., Sect. 1, ante, p. 7.

² *Kelman v. Barr's Trustees* (1878), 5 Ret. 817; *Ivory's Erskine*, p. 647 (note). See also numerous English cases, such as *Boyd v. Siffkin* (1809), 2 Camp. 326; *Johnson v. Macdonald* (1841), 9 M. & W. 600; Benjamin, p. 559 *et seq.*

³ As to impossibility of performance see Stair, i. 10. 13; Ersk. iii. 3. 84; Dig. 18. 1. 8. pr.; Benjamin, p. 81; M. P. Brown, p. 110; *Gowans v. Christie* (1873), 11 Macp. H.L. 1; *Gillespie and Co. v. Howden and Co.* (1885), 12 Ret. 800; *Smith v. Riddell* (1886), 14 Ret. 95; *North British Ry. Co. v. Benhar Coal Co.* (1886), 14 Ret. 141. "An agreement to do an act impossible in itself is void" (Indian Contract Act, Sect. 56). In discussing the different kinds of impossibility of performance, Pollock says: "An agreement is not void merely by reason of the performance being impossible in fact, nor does it become void by the performance becoming impossible in fact without the default of either party, unless, according to the true intention of the parties, the agreement was conditional on the performance of it being or continuing possible in fact. Such an intention is presumed where the performance of the contract depends on the existence of a specific thing."—Pollock on *Contracts*, 6th ed. p. 382. See also Sect. 11 (3) of this Act.

⁴ "A condition is either a promise or the statement of a fact in a contract upon the truth of which the existence of a contract is to depend"—*Behn v. Burness* (1862), 3 B. & S. 751; *Colvin v. Short* (1857), 19 D. 890; Anson on *Contracts*, 6th ed. pp. 146, 201.

⁵ Benjamin, p. 940; Bell's *Prin.*, Sect. 120.

Sect. 10.

right to claim damages in diminution or extinction of the price.¹

Warranties.

The term "warranty" is used in the Act in a peculiarly English sense. It is defined as regards England and Ireland as "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated."² In Scotland, however, the word "warranty" is generally used in its natural sense of guarantee (*i.e.* condition), and it is practically so defined as to Scotland in Sect. 62 (1).³

Conditions in Scotland.

Conditions in Scotland are divided into "suspensive" and "resolutive," corresponding to what are termed in England conditions "precedent" and "subsequent."⁴

Suspensive and resolutive.

A suspensive condition holds the sale in suspense until the condition is fulfilled. A resolutive condition implies that a sale has taken place, but that in a certain event it will be resolved or "dissolved," and the subject of sale become unsold, *res fit inempta*.⁵ In the event of the sale

¹ Sects. 11 (2) and 53 (1).

² Sect. 62 (1). Anson points out no less than six different meanings of the word "warranty" in English law (*Contracts*, 6th ed. p. 303). The definition given above is the one usually recognised in connection with sale. It is founded on the judgment of Lord Abinger in *Chanter v. Hopkins* (1838), 4 M. & W. 399, where warranty is distinguished from condition. Both are parts of the contract, but a condition is fundamental and essential, while a warranty is only collateral. But both condition and warranty are to be distinguished from mere representation, which has no effect on the contract of sale except where the representation is fraudulent. The use of a particular word will not, however, affect the substance of the thing intended. "A stipulation may be a condition, though called a warranty in the contract" [Sect. 11 (1) (b)], and in like manner a representation may amount to a warranty. "When a contract is entered into between two parties every representation made at the time of entering into the contract may or may not be intended as a warranty or as a promise that the representation is true." —Per Bowen, L.J., in *Bentzen v. Taylor, Son, and Co.* [1893], 2 Q.B. at p. 281.

³ The use of the word "warranty" in Sect. 12 (2) is exceptional in the case of Scotland, at least in connection with the sale of goods.

⁴ In the bill as introduced in 1891 the interpretation clause bore, "A condition includes a resolutive as well as a suspensive condition." In Committee of the Lords the words were changed to "condition means a condition precedent," but at the report stage in 1892 all reference to "condition" was deleted from the clause.

⁵ Stair, i. 14. 3 to 5; Bell's *Com.* i. 256 *et seq.*; M. P. Brown, pp. 32 *et seq.* and 427 *et seq.* As an example of a resolutive condition, see *Graham v. Wilson* (1836), 14 Sh. 866. In *Macarney v. Macredie's Creditors* (1799),

being resolved, the rights of parties will be extricated according to agreement, or failing agreement by restoring each party as nearly as possible to his former position. The rights of third parties are affected differently by the two kinds of conditions. A suspensive condition will be good against third parties acquiring a title from a person to whom the property in the goods has not passed, and who is consequently not the true owner.¹ A resolute condition, on the other hand, does not prevent the buyer from giving a title to others which will prevent the seller from reclaiming the property.² If a condition is truly suspensive of the sale it will not be affected by Sect. 25 (2).³ There is no sale pending the condition, and therefore no buyer to whom the terms of the section referred to can be applied. Thus, under Sect. 18, Rule 4, where goods are delivered to the buyer on "approval" or on "sale or return," the property does not pass till the occurrence of the events mentioned in the section, which in each case is practically a condition suspensive of the sale. It is true that one of the parties will be bound irrevocably in the event of the other exercising the option conferred upon him. If, however, the option is not exercised, not only does the property not pass, but both parties are as free as if the contract had never been entered into.⁴

There may, however, be a condition, not suspensive of

Conditions not
suspensive of
the sale.

Mor. Sale, App. No. 1, the Lord Ordinary (Meadowbank) thought the condition resolute, but the Court altered and found it suspensive. The final judgment was, however, founded on an erroneous view of stoppage *in transitu*. The delivery was to the buyer himself, hence there could be no transitus. More (notes to Stair, lxxxviii.) views the condition in *Macartney's Case* as resolute.

¹ See Sect. 21. But the holder of the goods, if a "mercantile agent," will be subject to Sect. 2 of the Factors Act, 1889 (52 & 53 Vict. c. 45).

² Stair, i. 14. 4 and 5; Bankton, i. 19. 29 *et seq.*; Ersk. iii. 3. 11; M. P. Brown, p. 427 *et seq.* Where delivery has been obtained under a resolute condition the condition is not effectual against the buyer's creditors. See Ersk. iii. 3. 12, and Ivory's note, p. 648; Pothier, *Oblig.*, No. 224; Bell's *Com.* i. 259, 260; Bell's *Prin.*, Sect. 110. In *Allan and Co.'s Trustee v. Gunn and Co.* (1883), 10 Ret. 997, a resolute condition of the nature of a *pactum de retrovendendo* was held effectual against creditors of the buyer, but the case is of doubtful authority. See *post*, p. 278.

³ The sub-section referred to is taken almost verbatim from Sect. 9 of the Factors Act 1889 (52 & 53 Vict. c. 45), extended to Scotland by the Factors (Scotland) Act 1890 (53 & 54 Vict. c. 40).

⁴ See *COM.*, Sect. 18, Rule 4 *post*, p. 94.

Sect. 10.

Stipulations as to time of payment.

Time of payment in connection with continuing contracts.

the sale, but merely suspending the passing of the property, as to which see COM., Sect. 17 *post*, p. 83.

This section deals with stipulations as to time of payment, and is founded on the English case of *Martindale v. Smith*¹ (1841). The law of Scotland is not changed. Unless expressly so agreed, payment of the price upon delivery of the goods, or upon a day named, is neither a condition of the sale nor of the passing of the property.² But, as we have seen, the stipulation may be so expressed as to be suspensive,³ and such a stipulation may also be imported into the contract by usage of trade.⁴

The question whether time of payment is an essential condition may arise in connection with a continuing contract. Thus where coal was to be delivered in monthly instalments, and the price settled monthly, it was held that the sellers were not bound to continue deliveries into another month while the price of the deliveries for the previous month remained unsettled. "The completion of the monthly delivery," says Lord Justice-Clerk Moncreiff, "and the obligation to pay the monthly price, were in this contract concurrent, both from its general import and because it was plainly contemplated that the sellers, who were not coalmasters, were to be assisted in their monthly deliveries by the settlement of the price from time to time. It therefore

¹ 1 Q.B. 389.

² In *Linn v. Shields* (1863), 2 Macp. 88, the contract, as interpreted by the Court, was "cash on delivery." Cash not having been paid on the delivery of a small portion of the goods, the seller maintained that his obligation to deliver the remainder was at an end; in other words, that in his option the contract was rescinded. This plea was negatived on the ground that the mode and time of payment had not been made an express condition. Lord Justice-Clerk Inglis held that the seller had mistaken his position. (2 Macp. at p. 93). The mere fact that payment by draft forms a term of the contract, and that the buyer has not accepted the seller's draft, will not prevent the property passing unless a *jus disponendi* (see Sect. 19) has either been reserved in the contract, or is to be inferred from the circumstances. Compare *Clarke and Co. v. Miller and Sons' Trustee* (1885), 12 Ret. 1036, with *Brandt and Co. v. Dickson* (1876), 3 Ret. 375. Time of payment was, however, held to be of the essence of the contract in *Young v. Dunn* (1785), Mor. 14191; *Hills v. Buchanan* (1785), Mor. 14200; *Affid. H. of L.* (1786), 3 Pat. App. 47; *Brodie v. Todd and Co.* (20th May 1814), F.C.

³ *Stair*, i. 14. 4; *Ersk.* iii. 3. 11; *Bell's Com.* i. 149. See also Sect. 19 as to reservation of *jus disponendi*.

⁴ *E.g. Turnbull v. M'Lean and Co.* (1874), 1 Ret. 730.

cannot be said that the time of payment was less of the essence of the contract than the payment itself."¹ **Sect. 10.**

Stipulations as to time other than time of payment are entirely matter of construction. "Where a purchaser means to make it an essential condition of his bargain that certain things should be done by a given day, he must take care to express this condition in the most distinct terms, and on failure to fulfil the condition he should immediately declare his bargain to be at an end."² In *Bowes v. Shand*³ (1877) a provision of the contract that rice was to be shipped "during the months of March and [or] April" was held to import an essential condition of time, so that rice shipped during February did not fall under it.⁴ In giving judgment in the Divisional Court Blackburn, J., said: "It was argued, or tried to be argued, that it was immaterial when the rice was shipped . . . its being shipped at another and a different time, being (it was said) only a breach of stipulation which could be compensated for in damages, but I think that that is quite untenable."⁵ This judgment was reversed in the Court of Appeal,⁶ but was restored in the House of Lords.⁷ **Stipulations as to time other than time of payment.**

11.—(1.) In England or Ireland—

(a.) Where a contract of sale is subject to any condition^(a) to be fulfilled by the seller, the

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WHEN CONDITION TO BE TREATED AS WARRANTY.

¹ *Turnbull v. M'Lean and Co.* (1874), 1 Ret. 730, at p. 738. See also *Com.*, Sect. 31 *post*, p. 152, and cases there discussed.

² Per Lord Balgray in *Raeburn v. Baird* (1832), 10 Sh. 765. The condition founded on was held not essential in *Raeburn v. Baird*, *supra*, and in *Forbes v. Campbell* (1885), 12 Ret. 1065; but it was held otherwise in *Hannay v. Stothert* (1788), Mor. 14194; *Robb v. Cruickshank* (1840), 2 D. 988; *Colvin v. Short* (1857), 19 D. 890; *M'Bride v. Hamilton and Son* (1872), 2 Ret. 775. See Bell's *Com.* i. 258, and remarks of Lord Shand in *Grieve, Son, and Co. v. Konig* (1880), 7 Ret. 521, at p. 524.

³ 2 App. Cas. 455.

⁴ The circumstances of the Scottish case, *Whitson v. Neilson and Co.* (1828), 6 Sh. 579, bear a certain resemblance, but the specialties fully justified the finding of the Court that the seller's obligation as to delivery had been implemented.

⁵ 1 Q.B.D. at p. 480.

⁶ 2 Q.B.D. 112.

⁷ 2 App. Cas. 455. See especially per Lord Cairns at p. 463, and see also *Reuter v. Sala* (1879), 4 C.P.D. 239, per Cotton, L. J., at pp. 246, 249.

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buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty,^(b) and not as a ground for treating the contract as repudiated.

(b.) Whether a stipulation in a contract of sale is a condition,^(a) the breach of which may give rise to a right to treat the contract as repudiated, or a warranty,^(b) the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract.^(c) A stipulation may be a condition, though called a warranty in the contract.

(c.) Where a contract of sale is not severable,^(d) and the buyer has accepted^(e) the goods, or part thereof; or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied,^(f) to that effect.

(2.) In Scotland, failure by the seller to perform any material part^(g) of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time^(h) after delivery to reject⁽ⁱ⁾ the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material

part as a breach which may give rise to a claim for Sect. 11. compensation or damages.⁽⁶⁾

(3.) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility^(k) or otherwise.^(l)

NOTES.

(a) "*Condition*" is here opposed to "*warranty*" and means a stipulation, the breach of which gives rise to "a right to treat the contract as repudiated." The word is not expressly defined in the Act, but inferentially this definition is contained in Sub-Sect. (1) (b) of this section, and in the definition of warranty [Sect. 62 (1)]. See COM., Sect. 10 *ante*, p. 44.

(b) "*Warranty*" as regards England and Ireland is more fully defined in Sect. 62 (1).

(c) "*Construction of the contract.*" COM. *infra*, p. 52.

(d) "*Severable contract.*" See Sect. 31 (2).

(e) "*Acceptance*" is here used in the sense of Sect. 35, not of Sect. 4.

(f) "*Express or implied.*" See Sect. 55.

(g) "*Material part.*" "As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract." Sect. 62 (1). This is not, strictly speaking, a definition of "*warranty*" in Scotland, but the effect of a breach is precisely the same as that of a condition, and warranty may therefore be taken to mean condition. In England "*warranty*" has a different meaning. See Sub-Sect. (1) (b) *supra*, and Sect. 62 (1).

(h) "*Reasonable time.*" See Sect. 35. "What is a reasonable time is a question of fact" [Sect. 56]. See COM. *infra*, p. 53.

(i) "*Reject.*" The buyer's right of rejection in Scotland is reserved by Sect. 53 (5).

(j) "*Compensation or damages.*" As in the case of an English "*warranty*." The buyer's remedies both in England and Scotland are specified in Sects. 51 and 53. In Scotland where the buyer is entitled to reject and exercises his right, the seller is in the position of having failed to deliver the contract goods, and the buyer's remedy is therefore under Sect. 51.

(k) "*Impossibility.*" COM., Sect. 10 *ante*, p. 45.

(l) "*Or otherwise.*" This may refer to illegality.

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COMMENTARY.

The adjustment of this section in Parliament gave rise to considerable difficulty, especially in the adaptation of its provisions to Scotland. Formerly the buyer in England had greater latitude in regard to claims of damages than the buyer in Scotland; but, on the other hand, his right to rescind the contract was more limited. This arose from the English division of the stipulations of a contract into "conditions" and "warranties"¹ a breach of the former of which justified rejection and rescission, while a breach of the latter merely gave rise to a claim for damages. In the case of a "warranty" in England the buyer cannot rescind the contract, but in Scotland every warranty is a "condition," a breach of which gives a right of rescission.²

Construction
of the contract.

As stated in the section it depends (in England and Ireland) upon the "construction of the contract" whether a stipulation is a "condition" or a "warranty," but, judged by a Scottish standard, the canons of construction founded on judicial interpretation are uncertain and arbitrary. While, therefore, it was desired to adopt in Scotland the *actio quanti minoris*, forming the remedy under an English "warranty," it was not deemed expedient to incorporate with it the English rules relating to warranties themselves. It will be observed that sub-section (2) gives the buyer in Scotland a right to keep the goods and claim damages without restricting the right which he previously possessed of rejecting the goods and rescinding the contract.³ The buyer in Scotland has thus an alternative remedy, and is not only in a more advantageous position than formerly, but has a privilege not known in England.

The law of Scotland before the passing of this Act did not absolutely reject the *actio quanti minoris*, but confined

¹ See definition of "warranty" Sect. 62 (1). See also Com., Sect. 10 *ante*, p. 46.

² The buyer's remedies in Scotland before this Act are explained by Lord President Inglis in *M'Cormick and Co. v. Rittmeyer and Co.* (1869), 7 Macp. 854 at p. 858.

³ As to the *actio redhibitoria*, see Moyle's *Sale in the Civil Law*, pp. 194, 201; Mackintosh on *Roman Law of Sale*, p. 157; M. P. Brown on *Sale*, p. 285.

its application to the case of "a latent infirmity either in the title or the quality of the subjects sold discovered when matters were no longer entire."¹ It was a pre-requisite to the buyer's claim for relief that, immediately on the discovery of the defect, the contract should be rescinded and both parties placed in the position they occupied before it was entered into, but if restoration of the article sold was impossible in consequence of the defect not being discoverable until after consumption or use by the buyer, the seller was not obliged to return the price if it had been paid, and on the other hand the buyer was free to prove his damage.² The remedy of rescission, thus qualified, is not impaired by the Act, but if a buyer rescinds instead of taking advantage of the *actio quanti minoris* in the form now enacted for Scotland, he must conform to the old condition of rejection and timeous intimation to the seller.

The section expressly provides that the remedy of rejection of the goods and rescission of the contract must be exercised within a "reasonable time."³ In every case the buyer must reject without undue delay, but in Scotland such rejection is not necessarily connected with the act of delivery. In England delivery and acceptance are concurrent conditions,⁴ and goods once accepted cannot be afterwards rejected, but in Scotland the question may turn upon timeous rejection *after* delivery.⁵ If the breach of contract is patent the buyer must intimate the rejection immediately,⁶ but if it is latent, as often happens, especially

Notice of rejection—
Reasonable time.

¹ Per Lord M'Laren in *Louitit's Trustees v. Highland Railway Co.* (1892), 19 Ret. 791 at p. 800.

² Bell's *Com.* i. 463-465.

³ "What is a reasonable time is a question of fact." Sect. 56.

⁴ Benjamin, p. 710. But mere receipt is not necessarily acceptance. *Com.*, Sect. 35 *post*, p. 169.

⁵ The distinction between the English and the Scottish rule is pointed out by Lord Chelmsford in *Couston, Thomson, and Co. v. Chapman* (1872), 10 Macp. H.L. 74 at p. 80. The sale in question was by sample, but the principle is applicable to any executory sale. See *Com.*, Sect. 35 *post*, p. 171. The buyer is not obliged to return rejected goods [Sect. 36], but failing return of the goods he must give the seller timeous intimation of rejection [Sect. 35].

⁶ "I hold it of the greatest consequence in cases such as the present to enforce strictly the rule of law as to the obligation of a purchaser to examine his goods without delay."—Per Lord Justice-Clerk Hope in *Smart v. Begg* (1852), 14 D. 912 at p. 915. "According to all the authorities it is for the purchaser of goods to satisfy himself whether the contract has been fulfilled, and, if not, to return them to the seller *instantly*."—Per Lord President

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in the case of seeds bought for the purpose of being sown, it is sufficient if the rejection is intimated immediately on the defect being discovered.¹

Notice of intention to claim damages.

Under the buyer's new alternative right it is open to him to retain the goods and treat the breach as giving rise to a claim for damages "in diminution or extinction of the price."² There is no express time limitation of this right. It is not provided that notice of the intention to claim damages must be given within a specified time, or within a "reasonable time," or, indeed, that any notice whatever is required. In England no notice is necessary where the breach is that of a warranty, but the want of notice raises a strong presumption that the complaint is not well founded.³ A similar presumption will probably be applied in Scotland.

Inglis, in *Carter and Co. v. Campbell* (1885), 12 Ret. 1075 at p. 1079. Even where the word *instantly* is used it implies that the goods have been fully delivered to the buyer, for it is a *return* of the goods, or an offer to return them, which the law requires, not a conditional delivery of them as in England. Such words as "immediately," "instantly," "without delay," etc., express no more than the "reasonable time" allowed by the section. Even where the defect is not latent the buyer must have a fair opportunity for examination, but the precise time will vary according to the circumstances. In the following cases the intimation of rejection was held timely:—*M'Bey v. Gardiner* (1858), 20 D. 1151 (three days); *M'Carter v. Stewart and Mackenzie* (1877), 4 Ret. 390 (five days); *Wallace v. Robinson* (1885), 22 S.L.R. 830 (seven days); *Lamb v. M'Kenzie and Sons* (1891), 8 Sh. Ct. Rep. 28 (three days). On the other hand, in *Stevenson v. Dalrymple* (1808), Mor. App. Sale 5, intimation of rejection three weeks after receipt of the goods was held insufficient. See also *Strange v. Jardine* (1894), 11 Sh. Ct. Rep. 49. As to the conditions attached to the buyer's right of rejection, see also Sect. 35 and *COM. post*, p. 171.

¹ *Adamson v. Smith* (1799), Mor. 14244; *Dickson and Co. v. Kincaid* (15th December 1808), F.C.; *Hill v. Pringle* (1827), 6 Sh. 229; *M'Caw, Stevenson, and Orr, Ltd. v. MacLaren and Sons* (1893), 20 Ret. 437. In the case of seeds the buyer's remedy has been denied on the following grounds: (1) Non-timely intimation of rejection—*Murdoch v. Richardson* (1776), 5 Br. Sup. 583; *Baird v. Aitken* (1788), Mor. 14243; *Carter and Co. v. Campbell* (1885), 12 Ret. 1075; *Wilson v. Carmichael and Sons* (1894), 21 Ret. 732. (2) The alleged defect not proved—*Alston v. Orr* (1668), Mor. 14231; *Stewart v. Jamieson* (1863), 1 Macp. 525. (3) Implied warranty excluded by the Mercantile Law Amendment Act 1856—*Hardie v. Austin and M'Alton* (1870), 8 Macp. 798; *Hardie v. Smith and Simons* (1870), 42 Sc. Jur. 454. (4) Implied warranty excluded by the terms of the contract—*e.g. Smith and Sons v. Waite, Nash, and Co.* (1888), 15 Ret. 538.

² Sect. 53. The price, or the price with interest, may form the measure of the buyer's damage. If payment has been made, the buyer may claim repayment; if not paid, the buyer's obligation to pay is extinguished—*Brown v. Laurie* (1791), Mor. 14244; *Adamson v. Smith* (1799), Mor. 14244; *Wright v. Blackwood* (1883), 11 Sh. 722.

³ "No length of time elapsed after the sale will alter the nature of a

Although the buyer who rejects goods is not entitled to retain them in respect of damages or expenses, he may do so (after due notice) in security of repayment of the price.¹ On the other hand, as a check upon frivolous complaints and claims on the part of the buyer, Sect. 59 provides that the Court in Scotland may order the buyer to consign the price or give reasonable security for its due payment.

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Retention by
buyer for re-
payment of
price.

Where the seller's conduct was tainted with fraud it was assumed, if not decided, under the former law of Scotland, that the buyer might exercise the option now extended to the general case. He was not obliged to rescind the contract and reject the goods, but might if he pleased retain and claim damages.² Although this alternative is now open to the buyer without allegation of

Seller's fraud.

contract originally false. Neither is notice necessary to be given, though the not giving notice will be a strong presumption against the buyer . . . and will make the proof on his part much more difficult."—Per Lord Loughborough in *Fielder v. Starkin* (1788), 1 H. Bl. 17, at p. 19. See also *Fisher v. Samuda* (1807), 1 Camp. 190; *Poulton v. Lattimore* (1829), 9 B. & C. 259; *Patehall v. Tranter* (1835), 3 A. & E. 103; Benjamin on Sale, p. 945.

¹ *Padgett and Co. v. M'Nair and Brand* (1852), 15 D. 76; *Melville v. Crichtley and Co.* (1856), 18 D. 643; *Laing v. Western* (1858), 20 D. 519.

² *Stair*, i. 9. 14; *Bell's Com.* i. 467, note; *Menzies v. Macharg* (1760), Mor. 14165; *Gray v. Hamilton* (1801), Mor. Sale, App. No. 2; *Amaan v. Handyside and Henderson* (1865), 3 Macp. 526; *Dobbie v. Duncanson* (1872), 10 Macp. 810. Non-disclosure by the seller of serious defect in the article sold was treated as fraud in *Duthie v. Carnegie* (21st January 1815), F.C.; *Rough v. Moir and Son* (1875), 2 Ret. 529. "At common law the liability of a seller who knows of defects in what he sells is a liability not upon warranty but upon fraud."—Per Lord Neaves in *Stewart v. Jamieson* (1863), 1 Macp. 525 at p. 531. This, however, does not solve the question whether, previous to the present Act, an action for damages could have been founded on the seller's fraud where the buyer kept the goods and did not repudiate the contract. It was, however, so assumed in recent cases in the House of Lords. Thus in *Houldsworth v. City of Glasgow Bank* (1880), 7 Ret. H.L. 53, Lord Cairns, L. C., said: "There is no doubt that, according to the law of England, a person purchasing a chattel or goods concerning which the vendor makes a fraudulent misrepresentation may, on finding out the fraud, retain the chattel or the goods, and have his action to recover any damages he has sustained by reason of the fraud. I will assume that the law of Scotland in the case of a chattel or of goods is the same as that of England" (7 Ret. H.L. at p. 55). Again, in *Brownlie v. Miller* (1880), 7 Ret. H.L. 66, Lord Blackburn assumed for the purpose of argument that the buyer had this privilege as against the fraudulent seller, but stated that he believed the point was not quite settled (7 Ret. H.L. at p. 79), and Lord Watson thought the point was surrounded with considerable difficulty in view of the decisions (7 Ret. H.L. at pp. 83, 84). The weight of authority in Scotland was, however, in favour of the admission of the *actio quanti minoris* as in place of a rescissory action. See argument of Lord Kinloch in *Amaan v. Handyside and Henderson*, 3 Macp. at pp. 526, 527. See also *Com.*, Sect. 14 *post*, p. 71; and *Com.*, Sect. 61 *post*, p. 271.

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fraud, the existence of fraud must necessarily widen and strengthen the remedy, and may be important in questions regarding "reasonable time," and the presumption arising from the buyer's delay in giving notice.

Questions
between
English and
Scottish con-
tracting
parties.

The buyer's remedy in Scotland has now gone beyond, instead of falling short of, the corresponding remedy in England. The laws of the two countries in this matter are not assimilated, and therefore questions of difficulty may still arise between English seller and Scottish buyer, or *vice versa*. If either country is clearly the *locus contractus*, the law of that country will probably prevail, but it is often difficult to determine whether a correspondence between England and Scotland results in an English or a Scottish contract.¹

Cases illus-
trative of
buyer's
remedy.

Additional cases illustrative of the buyer's remedies in Scotland before this Act will be found in the footnote.²

¹ See *Hope v. Crookston Brors.* (1890), 17 Ret. 368; *Hamlyn and Co. v. Talisker Distillery* (1893), 21 Ret. 204, Revd. H.L. (1894), 21 Ret. H.L. 21; *Starkie v. Paterson* (1893), 10 Sh. Ct. Repts. 27.

² *Aiton v. Fairie* (1668), Mor. 14230; *Paton v. Lockhart* (1675), Mor. 14232; *Seaton v. Carmichael* (1680), Mor. 14234; *Wallwood v. Gray* (1681), Mor. 14235; *Brisbane v. Merchants in Glasgow* (1684), Mor. 12328 & 14235; *Waison v. Stewart* (1694), 1 Fount. 589; *Mitchell v. Bisset* (1694), Mor. 14236; *Ralston v. Robertson* (1761), Mor. 14238; *Lindsay v. Wilson* (1771), 5 Br. Sup. 585; *Gordon v. Scott* (1778), 5 Br. Sup. 585; *Lombe v. Scott* (1779), Mor. 5627; *Brown v. Gilbert* (1791), Mor. 14244; *Grant v. Dumbreck* (1792), Hume 673; *Vickers and Co. v. Sheriff and Dudgeon* (1803), Hume 332; *Newmann, Hunt, and Co. v. Harris* (1803), Hume 335; *Stevenson v. Dalrymple* (1808), Mor. Sale, App. No. 5; *Sheriff v. Marshall* (1812), Hume 697; *Wilson v. Marshall* (1812), Hume 697; *Bennoch v. M'Kail* (27th January 1820), F.C.; *Bruce v. M'Kenzie* (1821), 1 Sh. 77 (N.E. 79); *Pitcairn v. Brown* (1823), 2 Sh. 576 (N.E. 495); *Jaffray v. Boag* (1824), 3 Sh. 375 (N.E. 266); *Cossar and Co. v. Marjoribanks* (1826), 4 Sh. 685 (N.E. 629); *Sharrat v. Turnbull* (1827), 5 Sh. 361; *Watt v. Glen* (1829), 7 Sh. 372; *Robertson v. Harford Brors. and Co.* (1832), H.L. 6 W.S. 1; *Fraser and Co. v. Outram and Co.* (1834), 13 Sh. 84; *Potter v. Greig* (1836), 14 Sh. 210; *Pollock v. Macadam* (1840), 2 D. 1026; *Napier v. Campbell* (1841), 3 D. 879; *Ransan v. Mitchell* (1845), 7 D. 813; *Ramsay v. M'Lellan and Son* (1845), 8 D. 142; *Smart v. Begg* (1852), 14 D. 912; *Padgett and Co. v. M'Nair and Brand* (1852), 15 D. 76; *M'Bey v. Gardiner* (1858), 20 D. 1151; *Todd and Higginbotham v. O'Regan* (1859), 21 D. 1320; *Edinr. and Leith Brewing Co. v. Reid* (1861), 24 D. 26; *Morson and Co. v. Burns* (1866), 5 Macp. 99; *Couston, Thomson, and Co. v. Chapman* (1872), 10 Macp. H.L. 74; *Smith Brors. and Co. v. Scott* (1875), 2 Ret. 601; *Croan v. Vallance* (1881), 8 Ret. 700; *Fleming and Co., Ltd. v. Airdrie Iron Co.* (1882), 9 Ret. 473; *Cal. Ry. Co. v. Rankin* (1882), 10 Ret. 68. See also *Morison v. Glen and Forrester* (1712), Mor. 14236; *Melville v. Crichtley and Co.* (1856), 18 D. 643; *Mackay v. Dick and Stevenson* (1881), 8 Ret. H.L. 37; *Bradley and Co. v. G. & W. Dollar* (1886), 13 Ret. 893. In a few cases the *actio quanti minoris* seems to have been admitted in opposition to the

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention,^(a) there is—

Sect. 12.
IMPLIED
UNDERTAKING
AS TO TITLE,
ETC.

(1.) An implied condition^(b) on the part of the seller that in the case of a sale^(c) he has a right to sell the goods, and that in the case of an agreement to sell^(c) he will have a right to sell the goods at the time when the property is to pass :^(d)

(2.) An implied warranty^(b) that the buyer shall have and enjoy quiet possession^(e) of the goods :

(3.) An implied warranty^(b) that the goods shall be free^(f) from any charge or encumbrance^(g) in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

NOTES.

(a) *Circumstances showing a different intention.* A sale by auction of forfeited pledges was held to imply a sale of such right only as the seller himself possessed.¹ Different intention may be inferred from the terms of the contract² or from the nature of the subject sold, e.g. a patent right.³

general principles of Scottish law, e.g. *Hoggernorth v. Hamilton* (1665), Mor. 14230; *Fairie v. Inglis* (1669), Mor. 14231; *Baird v. Charteris* (1686), Mor. 14235. In other cases the remedy has been allowed as forming an indirect term of the contract, e.g. *M'Cormick v. Rittmeyer* (1869), 7 Macp. 854; *Hope v. Crookston Brors.* (1890), 17 Ret. 868; or as arising out of circumstances otherwise inextricable, e.g. *Bailey and Co. v. Puterson* (1828), 4 Mur. 478 at p. 480; *Pearce Brors. v. Irons* (1869), 7 Macp. 571; *M'Carter v. Stewart and Mackenzie* (1877), 4 Ret. 890; *Spencer and Co. v. Dobie and Co.* (1879), 7 Ret. 396. See also *Reid v. Steele* (1824), 3 Sh. 201. The alternative remedy now allowed to the buyer is confined to the sale of goods. The law as to heritage is unaltered.

¹ *Morley v. Attenborough* (1849), 3 Exch. 500. The same rule seems to apply to any sale by a person acting in a special or limited capacity, such as a sale under a judicial warrant.

² *Leith Heritages Co. v. Edinr. and Leith Glass Co.* (1876), 3 Ret. 789.

³ *Hall v. Conder* (1857), 2 C.B. N.S. 22; *Smith v. Neale* (1857), 2 C.P. N.S. 67.

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(b) "*Condition*"—"warranty." See COM., Sect. 10 *ante*, p. 44 ; also Sect. 11, Note (a) *ante*, p. 51, and COM. *infra*, p. 60.

(c) "*Sale*"—"agreement to sell." Defined Sect. 1. See also Sect. 62 (1).

(d) *Passing of the property.* See Sect. 17.

(e) "*Quiet possession*"—"encumbrance." Words now for the first time applied to the sale of goods. Adopted from the English law of real estate.

(f) "*Shall be free.*" The words are not "*are free.*" The seller, therefore, does not warrant that the goods are free at the date of the contract, but that he is, or will be, in a position to discharge the encumbrance.

COMMENTARY.

Development
of law of im-
plied title in
England.

The rule of this section has been the subject of much controversy in England. The result of the older authorities was thus stated by Baron Parke in 1849. Where, in the sale of a specific chattel, there is no fraud or concealment on the part of the seller, and where nothing is said about title, "there is no warranty of title any more than there is of quality. The rule of *caveat emptor* applies to both."¹ Two years later Lord Campbell thus referred to Baron Parke's judgment. The exceptions stated in it, he said, "well-nigh eat up the rule. Executory contracts are said to be excepted ; so are sales in retail shops, or where there is a usage of trade ; so that there may be difficulty in finding cases to which the rule would practically apply."² The decision in *Eichholz v. Bannister*³ (1864) cast further doubt upon the rule itself, and led to a new rule formulated by Benjamin, and confirmed in *Raphael v. Burt*⁴ (1864), as follows : "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the

¹ In *Morley v. Attenborough*, 3 Ex. 500 at p. 510.

² In *Sims v. Marryat* (1851), 17 Q.B. 281 at p. 291.

³ 17 C.B. N.S. 708. A full review of the previous authorities will be found in the report of this case, pp. 709 to 720. See also Broom's *Legal Maxims*, 4th ed. p. 768.

⁴ Cababé and Ellis, p. 325.

chattel sold.”¹ This is the rule embodied in the first sub- **Sect. 12**
section, but to avoid ambiguity the word “condition” is
used instead of warranty.

During the development which led to the change of rule in England, the law of Scotland was often quoted, along with that of Rome, as affording an example of implied warranty of title.² The reference to the Civil Law was inaccurate, for under that law the only obligations of the seller were delivery, and a warranty against eviction.³ The buyer, even if he could show that the seller was not owner of the thing sold, was not entitled to get rid of his bargain so long as he had undisturbed possession. The language of Stair implies that the law of Scotland was the same,⁴ but it was early settled in Scotland that, at least in the case of heritage, the seller was bound to give a good title to the subject sold.⁵ Bell in certain passages, frequently cited in England, extended the rule to moveables,⁶ but M. P. Brown, after a careful review of the authorities, doubted if warranty of title in Scotland extended beyond sales of heritage.⁷ The judgment in *Swan v. Martin*⁸ (1865) supports the view that in Scotland before this Act the warranty in a sale of goods was only against eviction. The sale was of goodwill

¹ Benjamin, p. 634.

² E.g. by Baron Parke in *Morley v. Attenborough* (1849), 3 Ex. 500 at p. 510.

⁸ Dig. 18. 1. 25. 1; *ibid.* 19. 4. 1; Cod. 8. 44. 3; Moyle, p. 103 *et seq.*; Macintosh, p. 150 *et seq.*; Benjamin, p. 377 *et seq.*

⁴ Referring to the law of Rome (and inferentially to that of Scotland), Stair says:—"In sale, delivery of the goods or things bought, with the obligation of warrandice in case of eviction (which is implied in sale though not expressed) is the implement of it on the seller's part, and even though the buyer know and make it appear that it were not the seller's, yet he could demand no more but delivery and warrandice."—Stair, i. 14. 1.

⁵ *Nairn v. Scrymger* (1876), Mor. 14169; *E. Morton v. Cunningham* (1738), Mor. 14175; *Lockhart v. Johnston* (1742), Mor. 14176; *Little v. Dickson* (1749), Mor. 14177.

⁶ Bell on *Sale*, pp. 79, 94, 95. But Bell is inconsistent, or at least ambiguous, for, while stating the rule, he qualifies it in a manner destructive to its existence. "The seller," he says, "by the act of selling gives an implied assurance to the buyer that he holds such powers as effectually to make the transfer to him. This assurance resolves into a right on the part of the buyer and corresponding obligation on that of the seller *that the buyer shall be safe against eviction* or disappointment from other parties."—Bell on *Sale*, p. 95. In his *Principles* (Sect. 114) Bell states the rule without qualification.

⁷ M. P. Brown on *Sale*, pp. 281, 289.

⁸ 3 Macp. 851.

Sect. 12.

and fittings per inventory, and the Sheriff and Sheriff-Substitute (whose judgments were reversed) held that the pursuer had proved a title in another person, inconsistent with that of the seller. It was further urged that the property had never passed to the buyer, his possession being attributable to his occupation of the premises as lessee. The decision, however, is not necessarily inconsistent with the provisions of this section, taken in connection with the then existing law of Scotland as to rejection and repudiation. The buyer had been in possession for nearly three years before raising action, and the remedy asked was not rescission of the entire contract, but repayment of the price of certain items of the inventory, alleged by the buyer to have been claimed by the landlord. In holding that the action was not relevant without a statement of eviction or distress, the Court may have had in view that repudiation of the contract was not asked, and was perhaps impossible, and that therefore the remedy was limited to a warranty in the English sense of the term.

Exceptional
instance of
"warranty"
in Scotland.

It will be noticed that the first sub-section provides an implied *condition* and the remaining two sub-sections an implied *warranty*. The distinction illustrates an exceptional case in which, in the matter of warrandice, the law of England and the former law of Scotland run on parallel lines. "Warranty," as elsewhere observed,¹ is generally in Scotland equivalent to "condition," but an exception exists where *restitutio in integrum* is impossible, *e.g.* where delivery has been given and the subject of sale has been used by the buyer. In such a case the contract cannot be rescinded, and the buyer's only remedy is one of damages. It is true that the measure of damages may in some cases be repayment of the full price, as where seed has been sown resulting in a total failure of crop,² but the result is the same

¹ COM., Sect. 10 *ante*, p. 46.

² *Adamson v. Smith* (1799), Mor. 14244; *Wright v. Blackwood* (1838), 11 Sh. 722. The damages are assessed on the principle of indemnification, and may therefore include interest and expenses necessarily incurred by the buyer. *Adamson v. Smith*, and *Wright v. Blackwood* (*supra*); *Bell v. Queensberry's Executors* (1824), 3 Sh. 416. But see *Inglis v. Anstruther* (1771), Mor. 16633; *Stephen v. Lord Advocate* (1878), 6 Ret. 282.

whether the breach be viewed as relating to the contract itself according to the law of Scotland, or as arising out of a collateral contract of warranty according to the law of England. The first sub-section takes effect when the property passes and refers to the immediate effects of the contract; the second sub-section assumes that the buyer has had possession, but is afterwards disturbed by a title superior to that of the seller.¹ **Sect. 12.**

A warranty that the buyer shall have and enjoy quiet possession, clearly cannot imply an absolute warranty against unauthorised disturbance by third parties. "When a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title. And the reason is, because, as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world, but it would be an extravagant extension of such a covenant if it were good against all the acts which the folly or malice of strangers might suggest, and therefore the law has properly restrained it within its reasonable import; that is to rightful title."² **Limitation of warranty of title.**

Under the third sub-section the "implied warranty" is, in Scotland, equivalent to a "condition," a breach of which gives the buyer the option of repudiating the contract or claiming damages.³ If, however, the charge or incumbrance is not discovered until after possession and use of the thing **Charge or incumbrance.**

¹ The warranty in the second sub-section is analogous to warrandice in a conveyance of heritage. In reference to the latter Lord M'Laren remarks in a recent case that the remedy of restitution of the subjects sold and repayment of the price is singularly inappropriate. "Suppose," he says, "that thirty-nine years after the sale of an estate, a cottage or an acre of moorland, which had been included in a description of subjects, was found to belong to another proprietor. Is it consistent with legal principle or with justice, that the heirs of the seller should be required to repay the price, or should be obliged to take back the estate diminished by the evicted acre? . . . It is evident from the nature of the obligation of warrandice that it must in the general case, and probably in all cases, resolve into a claim of pecuniary indemnification for the loss of the subject of sale or its diminution in value." — *Welsh v. Russell* (1894), 21 Ret. 769 at p. 773.

² Per Lord Ellenborough in *Nash v. Palmer* (1816), 5 M. & S. 379 at p. 380.

³ See Sect. 11 (2), and definition of "warranty" in Scotland, Sect. 62 (1). But the transference of a Bill of Lading takes with it the liabilities as well as the rights of a consignor—18 & 19 Vict. c. 111, Sect. 1, preserved by Sect. 61 (3) of this Act.

Sect. 12. sold, the buyer's remedy will be limited to damages as in the case of the second sub-section.

Sect. 13.
SALE BY
DESCRIPTION.

13. Where there is a contract for the sale of goods by description,^(a) there is an implied condition^(b) that the goods shall correspond with the description ; and if the sale be by sample,^(c) as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

NOTES.

(a) "*Description.*" The word has two different meanings in the Act. It may be used in a generic sense to denote the intrinsic nature or quality of the article sold, as where the goods are said to be "of a description" (*i.e.* kind) "which it is in the course of the seller's business to supply"¹ [Sect. 14 (1)] ; or it may refer, as in this section, to a term of the contract expressing, *in written or spoken language*, the particular nature or quality which it is intended that the article should possess.² In the former case the word is applied to attributes generally ; in the latter, the meaning is restricted to the form of words by which certain particular attributes are expressed in the contract. It would seem from the judgment in *Randall v. Newson*³ (1877), that where a "description" is embodied in words in a contract, certain other words may be added by implication, so that in addition to an express description there may also be an *implied* description. If this be so, it involves serious confusion between this and the immediately succeeding section relating to implied warranties and conditions. The subject is discussed *COM. infra*, p. 64.

(b) "*Condition.*" Not a mere "warranty" in the English sense.

(c) "*Sale by sample.*" See Sect. 15.

¹ The same meaning is intended in Sect. 30 (3) where the words are, "mixed with goods of a different description."

² Section 14 (2) contains the word in both its applications.

³ 2 Q.B.D. 102.

COMMENTARY.

Sect. 13.

Although there is no implied warranty of *quality* or *fitness* except as in Sect. 14, the seller is bound to furnish goods of the *description*¹ specified in the contract. Thus delivery of an adulterated article in name of "Ichaboe guano,"² or "flax yarn,"³ or "oxalic acid,"⁴ or "cluster oats,"⁵ will not free the seller from his obligation. The thing delivered must meet the description in the ordinary sense of the term.⁶ "If," said Lord Blackburn (adopting an illustration of Lord Abinger), "you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it."⁷ A description may, however, be held to be substantially complied with, although from special circumstances the goods furnished do not correspond with its precise terms,⁸ while on the other hand a merely literal interpretation of a description may not convey its mercantile meaning to which the law will give effect.⁹ The rule is almost necessarily confined to executory contracts, for, where goods are "identified and agreed upon at the time the contract is made,"¹⁰ they cannot, in the ordinary case, be said to be sold by description. The section provides that where

Description as a term of the contract.

Description confined to executory contracts.

¹ Description is here used in the sense of a term of the contract. See note (a) *supra*. A single word may stand as the descriptive name of an article consisting of many separate but necessary parts, e.g. a ship, which includes all necessary sailing gear. See *Armstrong and Co. v. M'Gregor and Co.* (1875), 2 Ret. 339.

² *Paterson v. Dickson* (1850), 12 D. 502.

³ *Jaffé v. Ritchie* (1860), 23 D. 242.

⁴ *Josling v. Kingsford* (1863), 13 C.B. N.S. 447.

⁵ *Carter and Co. v. Campbell* (1885), 12 Ret. 1075.

⁶ If the name of the article indicates its purpose, it must be fit for that purpose—*Van Oppen v. Arbuckle* (1855), 18 D. 113 ("pint cork").

⁷ *Bowes v. Shand* (1877), 2 App. Ca. 455 at p. 480. See also *Tye v. Pymore* (1813), 3 Camp. 462 ("pimento"); *Gardiner v. Gray* (1815), 4 Camp. 144 ("waste silk"); *Allan v. Lake* (1852), 18 Q.B. 560 ("Skirving's Swedes"); *Nichol v. Godts* (1854), 10 Ex. 191 ("foreign refined rape oil"); *Wieler v. Schilizzi* (1856), 17 C.B. 619 ("Calcutta linseed"); *Azémar v. Casella* (1866), L.R. 2 C.P. 677 ("Salem cotton"); *Borrowman v. Drayton* (1876), 2 Ex. Div. 15 ("cargo" of goods).

⁸ *Hopkins v. Hitchcock* (1863), 14 C.B. N.S. 65.

⁹ *Powell v. Horton* (1836), 2 Bing. N.C. 668.

¹⁰ See definition of "specific goods," Sect. 62 (1).

Sect. 13.

the sale is by sample as well as by description the bulk must correspond with both. Such a combination does not alter the character of the sale, which, except in some rare cases, will be executory. Though sample is often given in sales of *specific* goods a *description* rarely forms a term of the contract except where the goods are furnished upon the buyer's order.¹

Is undertaking
as to quality
or fitness an
implied
description ?

The exceptions in Sect. 14 to the rule of "*Caveat emptor*" are sometimes based upon the theory of description. Thus in delivering the judgment of the Court of Appeal in *Randall v. Newson*² (1877) Brett, J., sums up a review of the authorities as follows:—"In some contracts the undertaking of the seller is said to be only that the article shall be merchantable; in others that it shall be reasonably fit for the purpose to which it is to be applied. In all cases it seems to us it is either assumed or expressly stated that the fundamental undertaking is that the article offered or delivered shall answer the description of it contained in the contract. That rule comprises all the others."³ In a case regarding "waste silk" Lord Ellenborough said: "The purchaser has a right to expect a saleable article answering the description in the contract."⁴ Commenting on this

¹ The distinction is clearly pointed out in *Couston, Thomson, and Co. v. Chapman* (1872), 10 Macp. H.L. 74, where in comparing the circumstances with those of *Jaffé v. Ritchie* (1860) 23 D. 242, cited in argument, Lord Chancellor Hatherly says: "The case cited was a case in which a person engaged to supply certain quantities of yarn according to sample. He might supply the yarn from whencesoever he pleased (there might not be a single hank of it *in esse* at the time beyond the sample of it), and he furnished some jute instead of flax. There, the very contract was for flax, not for jute, a thing different in *rerum natura*. But here, the contract was for certain specified wines lying in certain specified cellars" (10 Macp. H.L. at p. 80). See also Lord Colonsay to the same effect (at p. 84). The following cases illustrate executory sales by sample as well as by description:—*Van Oppen v. Arbuckle* (1855), 18 D. 113; *Kerr and Sons v. M'Dowall* (1828), 6 Sh. 1029; *Nichol v. Godts* (1854), 10 Ex. 191; *Azéma v. Casella* (1867), L.R. 2 C.P. 677; *Mody v. Gregson* (1868), L.R. 4 Ex. 49; *Macfarlane and Co. v. Taylor and Co.* (1868), 6 Macp. H.L. 1 (see specially p. 13).

² 2 Q.B.D. 102.

³ 2 Q.B.D. at p. 109. The authorities specially referred to by Brett, J., are—*Gardiner v. Gray* (1815), 4 Camp. 144; *Laing v. Fidgeon* (1815), 4 Camp. 169; *Gray v. Cox* (1825), 4 B. & C. 108; *Jones v. Bright* (1829), 5 Bing. 533; *Brown v. Edgington* (1841), 2 M. & G., 279; *Nichol v. Godts* (1854), 10 Ex. 191; *Wieler v. Schilizzi* (1856), 17 C.B. 619; *Jostling v. Kingsford* (1863), 13 C.B. N.S. 447; and *Jones v. Just* (1868), L.R. 3 Q.B. 197.

⁴ In *Gardiner v. Gray* (1815), 4 Camp. 144 at p. 145.

dictum Brett, J., says: "The decision is that the commodity offered and delivered must answer the description of it, and be 'saleable waste silk.'" ¹ But if the *expressed* description "waste silk" becomes, by the addition of an implied term, "saleable waste silk," and "carriage-pole" becomes "*reasonably-fit-and-proper-carriage-pole*," ² it is equally competent to imply any adjective or number of adjectives expressive of quality or fitness. In this view, the present section and the one immediately following deal with the same subject, but the one provides without limitation that the goods must correspond with the description,³ while the other provides that there is no implied warranty or condition as to quality or fitness, except in the special cases mentioned.⁴ This combination of description and implied condition of quality or fitness, raises a question of importance, and may lead to consequences not foreseen by the legislature. Thus it has been suggested by commentators entitled to respect, that the rule laid down in *Johnson v. Raylton* ⁵ (1881), that where a manufacturer sells goods he warrants them of his own manufacture, forms an instance of implied description, and continues to be the law of England under this section.⁶ In the original bill the rule was treated as an implied condition, and was embodied in Sect. 14⁷ in the following terms:—"Where there is a contract for the sale of goods by a manufacturer as such, there is, in the absence of any trade usage to the contrary, an implied undertaking that the goods are of the seller's own manufacture." This provision was deleted in Select Committee of the Lords, the understanding being that by this means the law of England was assimilated to that of Scotland, where by two decisions⁸ of earlier date a rule contrary to that of *Johnson v. Raylton* had been established. If, however, the rule of *Johnson v. Raylton* is preserved by the present section, the mere

Sale by a
manufacturer.

*Johnson v.
Raylton.*

¹ In *Randall v. Newson* (1877), 2 Q.B.D. at p. 106.

² *Randall v. Newson* (1877), 2 Q.B.D. 102.

³ Sect. 13. ⁴ Sect. 14.

⁵ 7 Q.B.D. 438.

⁶ Ker and Pearson-Gee on Sale of Goods Act, p. 87.

⁷ Clause 17 of the bill.

⁸ *West Stockton Iron Co. v. Neilson and Maxwell* (1880), 7 Ret. 1055; *Johnson and Reay v. Nicoll and Son* (1881), 8 Ret. 437.

Sect. 13.

reservation of the common law in Sect. 61 (2) may not be sufficient to prevent assimilation of the Scottish rule to that of England. This result was certainly not contemplated, and it is submitted that by the Act, not only is the Scottish rule preserved, but the English rule has ceased to exist. The effect of the reasoning of Brett, J., in *Randall v. Newson*, is to push a theory beyond reasonable limits, and no better illustration of its unsoundness could be found than its effect upon the circumstances of *Johnson v. Raylton*. It does not, however, seem to have occurred to the Lords-Justices who decided the latter case, that they were in any way dealing with a question of description.¹

Sect. 14.

IMPLIED CON-
DITIONS AS TO
QUALITY OR
FITNESS.

14. Subject to the provisions of this Act^(a) and of any statute in that behalf,^(b) there is no implied warranty or condition^(c) as to the quality^(d) or fitness for any particular purpose of goods supplied under a contract of sale,^(e) except as follows:—

(1.) Where the buyer, expressly or by implication,^(f) makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description^(g) which it is in the course of the seller's business to supply (whether he be the manufacturer^(h) or not), there is an implied condition

¹ There is no suggestion of implied *description* in the judgment. Various words and phrases are used, such as "agreement," "obligation," "implied stipulation," "suggested implication," "suggested contract." Brett, L. J., who delivered the opinion of the Court in *Randall v. Newson*, states the question in *Johnson v. Raylton* thus—"The question is whether, . . . there being no express stipulation that the goods are to be of the manufacture of the manufacturer, there is an *implied stipulation* that the goods shall be of the manufacture of the manufacturer who is to supply them" (7 Q.B.D. at p. 452); and again, "The question really is whether the *suggested contract* is to be implied from the fact of the order being given, or contract made, with a person holding himself out to be a manufacturer of such goods, and not holding himself out as otherwise dealing in such goods" (pp. 453, 454). It may further be noted that in *Johnson v. Raylton* the Court consisted of Cotton, Bramwell, and Brett, LL.-J., and that Bramwell, L. J., strongly dissented.

that the goods shall be reasonably fit⁽ⁿ⁾ for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name,^(o) there is no implied condition as to its fitness for any particular purpose :

(2.) Where goods are bought by description^(k) from a seller who deals in goods of that description^(k) (whether he be the manufacturer^(k) or not), there is an implied condition that the goods shall be of merchantable quality ; provided that if the buyer has examined⁽ⁿ⁾ the goods, there shall be no implied condition as regards defects which such examination ought to have revealed :

(3.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.^(m)

(4.) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.⁽ⁿ⁾

NOTES.

(a) *E.g.* Sect. 13 as to sale by description.

(b) "*Statute in that behalf.*" *E.g.* Chain Cables and Anchors Act 1874,¹ Sect. 4 (implied warranty that cable tested and stamped) ; Sale of Food and Drugs Act 1875,² Sect. 6 (penalty on sale of food or drugs not of nature, substance, or quality demanded) ; Merchandise Marks Act 1887,³ Sect. 17 (warranty that trade mark or trade description genuine) ;⁴ Fertilisers and Feeding Stuffs Act 1893,⁵ Sects. 1 & 2 (invoice containing specified particulars to act as a warranty).

(c) "*Warranty or condition.*" "Warranty" is defined as to England, Sect. 62 (1). The negative of "warranty" in that

¹ 37 & 38 Vict. c. 51.

² 50 & 51 Vict. c. 28.

⁵ 56 & 57 Vict. c. 56.

² 38 & 39 Vict. c. 63.

⁴ Section quoted in Appendix I. *post*, p. 296.

Sect. 14.

definition, and in Sect. 11 (1) (a), is inferentially a definition of "condition." The buyer may waive the condition and treat the seller's breach as a breach of warranty. In Scotland "warranty" and "condition" are synonymous, and entitle the party not in fault to repudiate the contract. COM., Sect. 10 *ante*, p. 46.

(d) "'Quality of goods' includes their state or condition." Sect. 62 (1).

(e) "*Contract of sale*." Defined Sect. 1 and Sect. 62 (1).

(f) "*By implication*." This is a new remedy in Scotland, having been previously excluded by the Mercantile Law Amendment Act, Scotland, 1856,¹ Sect. 5.

(g) "*Description*." See Sect. 13, note (a) *ante*, p. 62.

(h) "*Manufacturer*." Before the Act a manufacturer in England who sold goods was held to warrant that they were manufactured by himself.² It was otherwise in Scotland,³ and it would seem that the English rule has now been assimilated to that of Scotland.⁴

(i) "*Reasonably fit*." "When a party undertakes to supply an article for any particular purpose, he warrants that it shall be fit and proper for such purpose. If a purchaser himself selects the article, it has been held that the mere fact that the vendor knew the use for which it was designed, will not raise an implied warranty, because the skill and judgment of the latter are not relied on in making the purchase."⁵

(j) "*Patent or trade name*." Thus the sale of a machine under the name of "patent gas producer of the four cwt. per hour size," was held not to import a warranty that the machine was capable of consuming four cwts of coal per hour.⁶ A similar provision is contained in the Sale of Food and Drugs Act 1875 in regard to patent medicines.⁷

(k) "*Description*." Compare this sub-section with Sect. 13, and see note (a) *ante*, p. 62, and COM. *ante*, p. 64. The word "description" in this sub-section occurs twice, and seems to illustrate both of the meanings referred to *ante*, p. 62. In Scotland a small admixture of foreign substance has been held to entitle the buyer to repudiate the contract on the ground that the goods were not conform to description.⁸

¹ 19 & 20 Vict. c. 60.

² *Johnson v. Raylton* (1881), 7 Q.B.D. 438.

³ *West Stockton Iron Co. v. Neilson and Maxwell* (1880), 7 Ret. 1055; *Johnson and Reay v. Nicoll and Son* (1881), 8 Ret. 437.

⁴ But see COM., Sect. 13 *ante*, p. 65.

⁵ Per Erskine, J., in *Brown v. Edgington* (1841), 2 M. & G. 279 at p. 292.

⁶ *Rowan v. Coats' Iron and Steel Co.* (1885), 12 Ret. 395.

⁷ 38 & 39 Vict. c. 63, Sect. 6 (2).

⁸ *Jaffé v. Ritchie* (1860), 28 D. 242; *Carter and Co. v. Campbell* (1885), 12 Ret. 1075.

Perhaps a remedy may also be found under this sub-section **Sect. 14** on the ground that the goods are deficient in *quality*.

(l) "*Has examined*." In the original bill the exclusion of implied warranty did not depend on the *fact* of examination by the buyer, but upon his having had an *opportunity* of examination. The alteration was made in Select Committee of the Commons, and probably widens the previous English remedy.

(m) "*Usage of trade*." *COM. infra*, p. 72.

(n) "*Express*"—"implied." See **Sect. 55**, which expresses the converse of this sub-section. The law of Scotland is not altered.¹

COMMENTARY.

This section expresses what remains of the rule of *Caveat emptor*. "*caveat emptor*," but the rule itself is now subordinated to the exceptions.

The original principle of Scottish law was that a sound price implied a sound article, irrespective of the buyer's object in buying, or the knowledge of the parties regarding the condition of the goods.² Even in England there was at one time "a current opinion that a sound price was tantamount to a warranty³ of soundness,"⁴ but the older law⁵ of "*caveat emptor*" was re-affirmed by Lord Mansfield in 1778,⁶

¹ *Cooper and Aves v. Clydesdale Shipping Co.* (1868), 1 Macp. 677. The English law has been stated otherwise [Bell's *Com.* i. 470, M'Laren's note (8)], but correct by *Bigge v. Parkinson* (1862), 7 H. & N. 955; *Nichol v. Gods* (1854), 10 Ex. 191.

² "The principle of the law of Scotland is that every man selling an article is bound, though nothing is said of the quality, to supply a good article without defect unless there are circumstances to show that an inferior article was agreed on."—Per Lord Justice-Clerk Hope in *Whealler v. Melhuon* (1848), 5 D. 402 at p. 406. See also *Ralston v. Robertson* (1761), Mor. 14238; *Baird v. Pagan* (1765), Mor. 14240; *Lindsay v. Wilson* (1771), Mor. 14243; *Adamson v. Smith* (1799), Mor. 14244; *Campbell v. Mason* (1801), Hume 678; *Ralston v. Robb* (1808), Mor. Sale, App. 6; *Dickson and Co. v. Kincaid* (15th December 1808), F.C.; *Gilmer v. Galloway* (1830), 8 Sh. 420; *Paterson v. Dickson* (1850), 12 D. 502; *Fulton v. Watt* (1850), 22 Sc. Jur. 648. But, on the other hand, see *Stewart v. M'Nicol* (1814), Hume 701, where it was held that there was no implied warrandice in the case of a large lot of cattle purchased for a slump price. It seems to have been held that the bad must be taken with the good, as in the case of the sale of a draught of fishes.

³ "Warranty" is here used in the sense of "condition."

⁴ Per Grose, J., in *Parkinson v. Lee* (1802), 2 East 314 at p. 321.

⁵ See, for example, *Chandeler v. Lopus* (1603), Cro. Jac. 4; and Fitzherbert's *Natura Brevium* (1587), p. 94 C.

⁶ *Stuart v. Wilkins*, 1 Douglas 18.

Sect. 14.

Divergences
between law of
England and
Scotland.

and still more emphatically in the judgment in *Parkinson v. Lee*¹ (1802). Subsequent cases show the development in English law of the exceptions now embodied in this section.²

The exceptions in England to the rule of "*caveat emptor*" are so numerous that Scottish text-writers perhaps exaggerated the effect of the rule in producing divergence between the laws of the two countries. Bell, writing in 1843, called the difference between the rules a "remarkable distinction,"³ but when taken in connection with the exceptions in each case the divergence is comparatively trifling. Bell himself excepts from the Scottish rule of implied warranty "the case of faults so obvious that they cannot be supposed to escape ordinary observation,"⁴ while, speaking of English law, notwithstanding the general rule of *caveat emptor*, he excepts (1) warranty implied from trade usage; (2) implied warranty "that the article sold shall answer its description as understood in the trade"; and (3) implied warranty "in regard to an article ordered from a manufacturer that it shall be fit for the avowed purpose."⁵ In 1855 the Royal Commission appointed with a view to the assimilation of the laws of the United Kingdom, reported that the divergence should be removed, and that the Scottish rule should be assimilated to that of England and Ireland.⁶ Upon this Report was based the Mercantile Law Amendment Act, Scotland, 1856, which provided that where the seller was without knowledge that the goods were defective or

¹ 2 East 314. See also *La Neuville v. Nourse* (1813), 3 Camp. 350; *Barr v. Gibson* (1838), 3 M. & W. 390; *Chanter v. Hopkins* (1838), 4 M. & W. 399; *Ormsrod v. Huth* (1845), 14 M. & W. 651; *Ollivant v. Bayley* (1843), 5 Q.B. 288; *Burnley v. Bollett* (1847), 16 M. & W. 644; *Emmerton v. Matthews* (1862), 7 H. & N. 586; *Smith v. Baker* (1878), 40 L.J. N.S. 261.

² *Laing v. Fidgeon* (1815), 4 Camp. 169; *Jones v. Bright* (1829), 5 Bing. 533; *Brown v. Edgington* (1841), 2 M. & G. 279; *Shepherd v. Pybus* (1842), 3 M. & G. 868; *Beer v. Walker* (1877), 46 L.J. C.P. 677.

³ Bell on *Sale*, p. 96. See also M. P. Brown, pp. 285 *et seq.*; Bell's *Prin.*, Sects. 96, 97.

⁴ Bell on *Sale*, p. 96. *Muil v. Gibb* (1840), 2 D. 1227.

⁵ Bell on *Sale*, p. 99. The English authorities cited are *Jones v. Bowden* (1818), 4 Taunt. 847 (trade usage); *Gardiner v. Gray* (1815), 4 Camp. 144 (description—"waste silk"); *Bridge v. Wain* (1816), 1 Stark 504 (description—"scarlet cuttings"); *Laing v. Fidgeon* (1815), 6 Taunt. 108 (avowed purpose—saddles for export); *Jones v. Bright* (1829), 5 Bing. 533 (avowed purpose—copper sheathing for ship).

⁶ 2nd Report, p. 10. See also Appendix to Report, p. 130.

of bad quality he should not be held to warrant their quality or sufficiency, but the goods, with all faults, should be at the risk of the purchaser unless they were expressly sold for a specified and particular purpose.¹ This, it will be observed, did not produce assimilation; on the contrary, the divergence was increased. If the Scottish rule was formerly broader than the English one, it was now so narrowed as to form a greater contrast in the other direction. Apart from imputed fraud,² there was now no implied warranty except in the case of goods *expressly* sold for a specified and particular purpose. This excluded implied warranty arising from usage of trade, or from circumstances showing reliance by the buyer on the seller's skill or judgment, or from the fact that the seller was also manufacturer, and that the buyer had not had an opportunity for inspection. To exclude the operation of the Act in the case of specific goods it was necessary that there should be either (1) an *express* warranty, or (2) a sale *expressly* made for a specified and particular purpose. "You can never say that goods have been sold for a specified and particular purpose if they have been sold for the ordinary purpose for which all such goods are sold."³

Effect of
Scottish Mer-
cantile Law
Amendment
Act.

The provisions of the Mercantile Law Amendment Act are repealed by this Act,⁴ and the English and Scottish

¹ 19 & 20 Vict. c. 60, Sect. 5.

² See COM., Sect. 11 *ante*, p. 55; and COM., Sect. 61 *post*, p. 271.

³ Per Lord President Inglis in *Hamilton v. Robertson* (1878), 5 Ret. 839 at p. 842. See also *Dunlop v. Crawford* (1886), 13 Ret. 973 at p. 975. Effect was given to this view of the Mercantile Law Amendment Act in the following Sheriff Court cases:—*Adams v. Pattison and Co.* (1884), Guth. Sel. Ca. 2nd ser. p. 526; *Mollison v. Hamilton* (1886), 2 Shf. Ct. Rep. 303; *Young v. Gray* (1898), 10 Sh. Ct. Rep. 79. Under the Act an express warranty might be either written or verbal, but if verbal it was necessary to prove the very words used—*Robeson v. Waugh* (1874), 2 Ret. 63; *Mackie v. Riddell* (1874), 2 Ret. 115; *Rose v. Johnston* (1878), 5 Ret. 600. But see *Scott v. Steel* (1857), 20 D. 253. An express warranty was founded on in *Gardiner v. M'Leavy* (1880), 7 Ret. 612 (horse), and *Croan v. Vallance* (1881), 8 Ret. 700 (horse). The Act was held to apply in *Laing v. Western* (1858), 20 D. 519 (jewellery); *Young v. Giffen* (1858), 21 D. 87 (horse); *Hardie v. Austin and M'Aslan* (1870), 8 Macp. 798 (seeds); *Hardie v. Smith and Simons* (1870), 42 Sc. Jur. 454 (seeds); *Robeson v. Waugh*, *supra* (horse); *Rough v. Moir and Son* (1875), 2 Ret. 529 (horse); *Rose v. Johnston*, *supra* (horse); *Hamilton v. Robertson* (1878), 5 Ret. 839 (horse); *Dunlop v. Crawford* (1886), 13 Ret. 973 (cows). See further on this subject COM., Sect. 55 *post*, p. 258.

⁴ Sect. 60 and Schedule.

Sect. 14.

Effect of
section on
previous
English law.

rules as to implied warranty are now by this section completely assimilated.

The section was the subject of much consideration and frequent alteration in Parliament, and as finally adjusted it probably extends the exceptions to the rule of *caveat emptor* beyond the previously existing English exceptions. Thus (1) there is no distinction between a seller who is also a manufacturer and a seller who is simply a dealer;¹ (2) where goods are bought by description the buyer's remedy is not excluded by his having had an *opportunity* of examining the goods, if in point of fact he has not examined them;² and (3) even where the buyer has examined the goods, if the defect is latent and not such as the examination ought to have revealed, he may proceed upon an implied warranty by the seller.

Effect upon
previous law
of Scotland.

Comparing the section with the law of Scotland immediately before the passing of the Act, the following alterations may be noted:—

1. An implied warranty may now be gathered from any circumstances tending to show knowledge by the seller of the purpose for which the goods are required. Thus the known trade or occupation of the buyer may be important, as where cork is sold to a corkcutter, or flour to a baker, or small-wares to a retail dealer. Formerly in Scotland, in the case of specific goods, there was no implied warranty unless the purpose was *expressly* stated.³

2. Goods bought by description from a dealer must be of merchantable quality under that description. Formerly in the case of specific goods inferiority of quality gave no remedy by implication, unless there was at least a small percentage of adulteration to support a plea that the goods were not of the description stated in the contract.⁴

3. An implied warranty may now be annexed by usage

¹ See note (h) *supra*, p. 68; and Com., Sect. 13 *ante*, p. 65.

² See note (l) *supra*, p. 69.

³ 19 & 20 Vict. c. 60, Sect. 5.

⁴ *Hardie v. Austin and M'Aslan* (1870), 8 Macp. 798; *Hardie v. Smith and Simons* (1870), 42 Sc. Jur. 454. See note (k) *supra*, p. 68. But goods bought by description are seldom specific.

of trade. No exception of this nature was contained in the Act of 1856.¹ **Sect. 14.**

The section does not expressly limit the rule of *caveat emptor* to specific goods, but the exceptions to the rule cover almost every conceivable case of sales of goods *in genere*. By the former law of England implied conditions or warranties were not interfered with in the case of non-specific goods,² and in like manner it was held in Scotland that Sect. 5 of the Act of 1856,³ excluding implied warranty, only applied to goods *in corpore specifico*.⁴ *Caveat emptor* applies chiefly to specific goods.

In regard, therefore, to non-specific goods, the law of Scotland, previous to the present Act, did not differ from that of England.⁵

Sale by Sample.

15.—(1.) A contract of sale ^(a) is a contract for sale by sample where there is a term in the contract, express or implied,^(b) to that effect. **Sect. 15.**
SALE BY SAMPLE.

¹ 19 & 20 Vict. c. 60, Sect. 5.

² "Where a buyer buys a specific article the rule *caveat emptor* applies, but where the buyer orders goods to be supplied . . . there is an implied warranty."—Per Cockburn, C. J., in *Bigge v. Parkinson* (1862), 7 H. & N. 955 at p. 961. See also judgment of Parke, B., in *Barr v. Gibson* (1838), 3 M. & W. 390 at p. 399; and judgment of Grove, J., in *Smith v. Baker* (1878), 40 L.T. N.S. 261.

³ 19 & 20 Vict. c. 60.

⁴ "The kind of sale contemplated by the Act is a sale in which, after the constitution of the contract, the goods are at common law at the risk of the purchaser. That is a sale of a definite quantity or *corpus*, for unless it were that, the goods could not be at the risk of the purchaser."—Per Lord Justice-Clerk Inglis in *Jaffé v. Ritchie* (1860), 23 D. 242 at p. 249. See also *Hutchison and Co. v. Henry and Corrie* (1867), 6 Macp. 57; *Cooper and Aves v. Clydesdale Shipping Co.* (1863), 1 Macp. 677; *Cartier and Co. v. Campbell* (1885), 12 Ret. 1075. In a Scotch appeal Lord Chancellor Cairns incidentally applied the Mercantile Law Amendment Act (Scotland) to goods ordered and therefore not specific [*Macfarlane and Co. v. Taylor and Co.* (1868), 6 Macp. H.L. 1 at p. 14], but the *dictum* was not necessary to the judgment. It may be noted, however, that Scottish judges do not consistently apply the principles set forth in such cases as *Jaffé v. Ritchie*. Thus the Act has been applied to sales of seed which, when sown, proved defective, although the goods were furnished per order, and the risk could not pass to the purchaser before delivery. See e.g. *Stewart v. Jamieson* (1863), 1 Macp. 525, where the grounds of judgment in *Jaffé v. Ritchie* seem to have been entirely ignored.

⁵ "The law of England in such cases was always identical with the law of Scotland. If an order was given in a contract of sale in either country for an article which was bespoken with a view to be applied to a particular purpose, and the order was accepted, action would lie on that contract at the

Sect. 15.

- (2.) In the case of a contract for sale by sample—
- (a.) There is an implied condition ^(a) that the bulk shall correspond with the sample in quality: ^(d)
- (b.) There is an implied condition ^(e) that the buyer shall have a reasonable opportunity ^(e) of comparing the bulk with the sample :
- (c.) There is an implied condition ^(e) that the goods shall be free from any defect, rendering them unmerchantable, ^(b) which would not be apparent on reasonable examination of the sample. ^(c)

NOTES.

(a) "*Contract of sale.*" Defined Sect. 1 and Sect. 62 (1).

(b) "*Express or implied.*" There is no distinction in this section between a sample of specific goods and of goods to be manufactured or supplied. The former law, both of England and Scotland, seems to have made such a distinction, and only in the latter case to have implied a condition that the goods were free from defect, rendering them unmerchantable. COM. *infra*, p. 76.

(c) "*Condition.*" Not merely an English "warranty." COM., Sect. 10 *ante*, p. 46.

(d) "*Quality of goods* includes their state or condition." Sect. 62 (1).

(e) "*Reasonable opportunity.*" It was held by Lord Tenterden in *Lorymer v. Smith*¹ (1822), that the buyer had not received reasonable facilities for comparing the bulk with the sample.²

(f) Sub-sect. (2) (c) seems to widen the buyer's remedy in Scotland as it existed under the Mercantile Law Amendment Act 1856, Sect. 5. An *express* warranty was required,³ and no exception was made in the case of sale by sample.

instance of the purchaser for implement or damages just as in Scotland. There was no dissimilarity in that respect between the laws of the two countries to be corrected by legislation."—Per Lord Justice-Clerk Patton in *Hutchison and Co. v. Henry and Corrie* (1867), 6 Macp. 57 at p. 59.

¹ 1 B. & C. 1.

² The judgment in other respects contained bad law, and was corrected by *Hibbleshile v. M'Morine* (1839), 5 M. & W. 462.

³ COM., Sect 14 *ante*, p. 71.

COMMENTARY.

A sample is a description wanting words. It is an appeal to the understanding in which objective illustration takes the place of, or supplements written or spoken language.¹ A sale by sample has therefore the general legal effects of a sale by description, although sample and description may so supplement each other that correspondence of the article sold with both becomes essential.²

Sect. 15.
Relation of
sample to
description.

In one respect, however, there is a marked difference between description and sample. Description in the mercantile sense usually refers to the name of a *genus* to which well-known attributes are attached. If the thing furnished includes these attributes it corresponds with the description, although within the description itself there may be great diversity of quality. Sample, on the other hand, includes quality as well as the more general attributes. Thus, if goods are sold by sample and are described as "flax yarn," an admixture of jute in the goods furnished will render them disconform alike to sample and to description,³ but if the goods are entirely "flax yarn" they will correspond with the description, although they may fall far short of the sample in quality.

By Sect. 13 the goods must correspond with the description, but the correspondence there referred to is merely that of *kind*. In this section it is taken for granted that the goods correspond with the sample *in kind*, but it is expressly provided, in conformity with the principles stated above, that they must also correspond with the sample *in quality*. When goods are sold both by sample and by description, Sect. 14 provides that they must correspond with the description *as well as* with the sample. This illustrates a converse view of the relation of sample to description. The

¹ "The office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract, which, owing to the imperfection of language, it may be difficult or impossible to express in words."—Per Lord Macnaghten in *Drummond v. Van Ingen* (1887), 12 App. Cas. 284 at p. 297.

² As in Sect. 13.

³ See *Jaffé v. Ritchie* (1860), 23 D. 242.

Sect. 15.

goods may agree with the sample in every respect, but may not correspond with some of those attributes included in the name or phrase by which the *genus* is described.¹

Latent faults.

Assuming the goods to correspond both with sample and description, the buyer is further safeguarded against latent faults rendering the goods unmerchantable. Sect. 14 (2) applies to goods bought by description and the present section to goods bought by sample [15 (2) (c)]. In the former case, however, the defect must be such as not to be apparent on a reasonable examination of the *goods* by the buyer if he happens to have made such an examination, while in the latter case the defect must be such as not to be apparent on a reasonable examination of the *sample*.²

Sample in
executory sales
and in sales
of specific
goods.

It has been already noticed³ that description is almost necessarily confined to *executory* sales, and that the rule is not affected by a combination of description and sample. In this section, however, it is provided without qualification that where the sale is by sample the goods shall be "free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample." In the case of *specific* goods this appears to alter the previous law both of England and Scotland. A sample of specific goods is often given, and before the Act it reasonably inferred an undertaking that the bulk corresponded with the sample. But the seller did not undertake, nor did the law imply, any obligation as to merchantable quality. This explains the case of *Parkinson v. Lee*⁴ (1802), which is in sharp contrast to *Heilbutt v. Hickson*⁵ (1872). The distinction between these cases has sometimes been attributed to the fact that in *Parkinson v. Lee* the seller was a merchant, while in *Heilbutt v. Hickson* he was a manufacturer,⁶ and Lord Esher expressed the opinion that

¹ See *Mody v. Gregson* (1868), L.R. 4 Ex. 49, in which "grey shirtings" were conform to sample, but were found to be weighted with China clay, a substance entirely foreign to the description "grey shirtings."

² *Heilbutt v. Hickson* (1872), L.R. 7 C.P. 438.

³ Com., Sect. 13 *ante*, p. 63.

⁴ 2 East 314. See as to Scotland *Couston, Thomson, and Co. v. Chapman* (1872), 10 Macp. H.L. 74, and especially remarks of Lord Chancellor Hatherley at p. 80, and Lord Colonsay at p. 84.

⁵ L.R. 7 C.P. 438.

⁶ As to sale by a manufacturer see Com., Sect. 13 *ante*, p. 65.

the former case was no longer law.¹ It is submitted, **Sect. 15.** however, that as *Parkinson v. Lee* related to a sale of specific goods, this was a sufficient ground of judgment,² and that the law in this respect should have been preserved.

Sub-section (1) provides that to constitute a sale by sample there must be a term in the contract to that effect. The exhibition of a sample does not necessarily make it a term of the contract; but, on the other hand, such a term may be implied from the circumstances without being expressed. Where a sample is made use of it is often difficult to determine whether or not it enters into the constitution of the contract.³

Sample a term
in the contract.

As a term of the contract, care should be taken for the preservation and identification of the sample.⁴ To this end there existed an old Scottish practice of *sealing* the sample.⁵

Preservation
and identifica-
tion of sample.

¹ In *Randall v. Newson* (1877), 2 Q.B.D. 102 at p. 106.

² See Benjamin on *Sale*, pp. 637, 654, 663.

³ The sale was by sample in *Watt v. Glen* (1829), 7 Sh. 372; *Padgett and Co. v. M'Nair and Brand* (1852), 15 D. 76; *Jowett and Sons v. Stead* (1860), 22 D. 1400; *Couston, Thomson, and Co. v. Chapman* (1872), 10 Macp. H.L. 74; *Parkinson v. Lee* (1802), 2 East 314; *Parker v. Palmer* (1821), 4 B. & Ald. 387; *Lorymer v. Smith* (1822), 1 B. & C. 1; *Carter v. Crick* (1859), 4 H. & N. 412; *Russell v. Nicolopulo* (1860), 8 C.B. N.S. 362. Samples were exhibited or referred to, but the sale was held not to be by sample, in *Kerr and Sons v. M'Dowall* (1828), 6 Sh. 1029; *Muil v. Gibb* (1840), 2 D. 1227; *White and Co. Ltd. v. Dougherty* (1891), 18 Ret. 972; *Tye v. Fynmore* (1813), 3 Camp. 462; *Meyer v. Everth* (1814), 4 Camp. 22; *Gardiner v. Gray* (1815), 4 Camp. 144; *Powell v. Horton* (1836), 2 Bing. N.C. 668; *Josling v. Kingsford* (1863), 13 C.B. N.S. 447. In *Hills v. Buchanan* (1786), Mor. 14200, 8 Pat. App. 47, samples were sent after the contract had been completed. The question was one of constructive delivery, but it was explained that the object of sending samples to the buyer was to enable him to distinguish the respective qualities of different parcels of tobacco with a view to re-sale.

⁴ Bell's *Prin. Sect. 98*, quoted and approved by Lord President Inglis in *White and Co. Ltd. v. Dougherty* (1891), 18 Ret. 972.

⁵ *Cheap v. Clough* (1713), Mor. 14238. In a case where wheat was sold by sample, a witness for the seller stated that the buyer had tampered with the sample by picking out sprouted and moulded grains, but his evidence was unsupported, and was not credited—*Watt v. Glen* (1829), 7 Sh. 372. The same suggestion as to tampering with the sample was made in *Lamb v. M'Kenzie and Sons* (1891), 8 Sh. Ct. Repts. 28, and here also the evidence was held insufficient.

PART II.

EFFECTS OF THE CONTRACT.

Transfer of Property as between Seller and Buyer.^(a)

Sect. 16.

GOODS MUST
BE ASCER-
TAINED.

16. Where there is a contract for the sale of unascertained goods^(b) no property in the goods is transferred to the buyer unless and until the goods are ascertained.^(c)

NOTES.

(a) As to changes in the law of Scotland in connection with transfer of property, see COM., Sect. 1 *ante*, p. 3.

(b) "*Unascertained goods.*" That is, goods *in genere* as distinguished from "specific goods," which are defined [Sect. 62 (1)] as "goods identified and agreed upon at the time a contract of sale is made." Even in regard to specific goods the passing of the property is subject to the rules of Sect. 18, while in the case of unascertained or non-specific goods the property does not pass in any case. In an "executory sale" the goods are "*unascertained*," but they are not necessarily "*future goods*" [defined Sect. 62 (1)]. They may be *in esse* and belong to the seller, but may require to be selected from a larger number or taken from bulk.¹

¹ The following English cases may be consulted :—*Wallace v. Breeds* (1811), 13 East 522; *Austen v. Craven* (1812), 4 Taunt. 644; *Busk v. Davis* (1814), 2 M. & S. 397; *White v. Wilks* (1814), 5 Taunt. 176; *Shipley v. Davis* (1814), 5 Taunt. 617; *Campbell v. Mersey Docks Co.* (1863), 14 C.B. N.S. 412; *Gabarron v. Kreeft* (1867), L.R. 10 Ex. 274; *Jenner v. Smith* (1869), L.R. 4 C.P. 270. In all these cases there was an existing subject, but as the whole was not sold, and no particular part had been appropriated to the contract, no property passed to the buyer. See also *Rohde v. Thwaites* (1827), 6 B. & C. 388; *Dixon v. Yates* (1833), 5 B. & Ad. 313; *Aldridge v. Johnson* (1857), 7 E. & B. 885; *Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. Div. 164. The case of *Whitehouse v. Frost* (1810), 12 East 614, seems con-

(c) "*Ascertained.*" The word is not specially defined, but it may be taken to refer to goods made specific, i.e. "identified and agreed upon" [Sect. 62 (1)]. It has possibly a wider meaning in Sect. 52. See note (c) to that section *post*, p. 249. "Unconditionally appropriated" seems to have much the same meaning in Sect. 18, Rule (5). Sect. 16.

17.—(1.) Where there is a contract for the sale of specific or ascertained goods^(a) the property^(b) in them is transferred to the buyer at such time^(c) as the parties to the contract intend it to be transferred. Sect. 17.

PROPERTY
PASSES WHEN
INTENDED TO
PASS.

(2.) For the purpose of ascertaining the intention^(d) of the parties regard shall be had to the terms of the contract, the conduct of the parties,^(e) and the circumstances of the case.^(f)

NOTES.

(a) "*Specific or ascertained goods.*" "Specific goods" mean goods identified and agreed upon at the time a contract of sale is made" [Sect. 62 (1)]. The phrase "ascertained goods" is not defined, but may refer to goods made specific *after* the contract of sale. Probably the alternative "*specific or ascertained*" is used because, although "specific" is synonymous with "ascertained," it is not necessarily synchronous. Thus the goods may be specific at the date of the contract, or they may be afterwards ascertained, i.e. made specific. See also Sect. 16, note (c) *supra*, and Sect. 52, note (c) *post*, p. 249.

(b) "*Property.*" Defined as "the general property in goods and not merely a special property" [Sect. 62 (1)].

(c) "*At such time.*" *E.g.* the completion of the loading of a vessel,¹ or despatch of the goods from the vendor's warehouse.²

trary, but is generally disapproved. See Benjamin, 318. In Scotland, under the old law, the property only passed on delivery, which necessarily implied specific appropriation. In *Broughton v. Atchisons* (15th November 1809), F.C., the sale related to a portion only of the bulk, and there had been no appropriation, yet the Court held that the property had passed. This case, however, is of doubtful authority, and in the opinion of Bell "is not to be held as a precedent."—Bell's *Com.* i. 191, note. See also Ross, *Leading Cases, Com. Law*, ii. 567.

¹ *Anderson v. Morice* (1876), 1 App. Cas. 718.

² *Fragano v. Long* (1825), 4 B. & C. 219.

Sect. 17.

(d) Rules for ascertaining the intention are contained in Sect. 18.

(e) "*Conduct of the parties.*" E.g. in weighing, measuring, or putting the goods into a deliverable state.¹ The phrase may mean more than a "course of dealing" under Sect. 55. Thus one of the parties may, by his conduct, be barred *personali exceptione* from affirming or denying the intention to transfer.²

(f) "*Circumstances of the case.*" E.g. the circumstances may be such as to show a ready money transaction in which the transfer is conditional upon payment of the price.

COMMENTARY.

Change in the law of Scotland as to delivery and possession.

This section embodies an important change in the law of Scotland. Formerly the property in specific goods did not pass to the buyer until delivery, now it passes according to the intention of parties irrespective of delivery.³

Reputed ownership.

The former law of Scotland was based on the maxim that "the property of moveables is presumed from possession."⁴ In the form, however, of reputed ownership, the law went a step further than a mere presumption which may be overcome by contrary proof,⁵ and which can only be of importance as between competing parties, neither of whom has a valid independent title. Reputed ownership, where it was recognised, created a right in favour of the creditors of the possessor which was not affected by proof of a latent contrary right. But the strict theory was necessarily

¹ As in *Logan v. Le Mesurier* (1847), 6 Moo. P.C.C. 116, and *Gilmour v. Supple* (1858), 11 Moo. P.C.C. 551.

² As in *Richmond and Co. v. Railton* (1854), 16 D. 403.

³ Sect. 18, Rule 1.

⁴ Bell's *Com.* i. 178. "Tradition or delivery in a sale of moveables is important only as a means of obtaining possession, and possession is the true completion of the contract of sale."—Per Lord Justice-Clerk Moncreiff in *Orr's Trustee v. Tullis* (1870), 8 Macp. 936 at p. 945. The nature and essentials of possession are explained by Lord Neaves and Lord Kinloch in *Moore v. Gledden* (1869), 7 Macp. 1016 at pp. 1020, 1024. A classified list of Scottish cases relating to possession of moveables will be found in Appendix II. *post*, p. 312. The following is an English view of the subject:—"Possession of goods is *prima facie* evidence of title, but that possession may be precarious, as of a deposit; it may be criminal, as of a thing stolen; it may be qualified, as of things in the custody of a servant, carrier, or factor. Mere possession without a just title gives no property."—Per Lord Loughborough in *Lickbarrow v. Mason* (1790), 1 H.Bl. 357 at p. 360.

⁵ Bell's *Prin.*, Sect. 1314.

subject to various modifications, viz. (1) a common-law sanction to well-recognised contracts subordinate to ownership, such as lease;¹ (2) a common-law recognition of the intention of parties as embodied in a condition postponing the passing of the property as in hire-purchase;² and (3) a statutory right created in 1856, by which the buyer was preferred to the seller's creditors, although the goods had not been delivered,³ and a seller was bound under certain conditions to give delivery to a sub-purchaser notwithstanding a general balance due to him by the first purchaser.⁴

Sect. 17.

Modifications of rule.

These relaxations of the rule as to possession were not recognised without difficulty, and were occasionally strongly condemned.⁵ They were, however, rendered necessary by the greatly increased complexity of commercial interests in the present century. Bell, while speaking in almost affectionate terms of possession as "the true and proper badge of transferred property," admits that "an adherence to this plain and simple rule is utterly impossible amidst the complicated transactions of modern trade."⁶ Elsewhere he points out that "creditors in giving credit must henceforth⁷ lay their account with a suspending condition, and not conceive themselves entitled absolutely to rely on the property as irrevocably vested in their debtor."⁸ Finally, in his posthumous work on *Sale*, Bell speaks of the rights of the creditors of the seller as they existed in his day, and before

Reasons for modification.

¹ As in *Eadie v. Young* (1815), Hume 705, and *Orr's Trustee v. Tullis* (1870), 8 Macp. 936.

² See, for example, *Murdoch and Co. Ltd. v. Greig* (1889), 16 Ret. 396, correcting *Cropper and Co. v. Donaldson* (1880), 7 Ret. 1108. See also Arbitration Case, *Barclay and Brand v. Guild* (1876), reported Guth. Sel. Ca. 2nd ser. 519. Formal sanction is given by this Act to conditions suspensive of the passing of the property. See Sect. 19 *post*, p. 99.

³ 19 & 20 Vict. c. 60, Sect. 1, repealed by this Act, Sect. 60 and Schedule.

⁴ *Ibid.*, Sects. 2 and 3 repealed as above.

⁵ Lord Justice-Clerk Hope would not recognise any injustice in the seller's creditors carrying off the subject of sale from a buyer who had paid the price. "The principle of the Scotch law," he held, "is both recommended by practical justice and by expediency"—*Boak v. Megget* (1844), 6 D. 662 at p. 668. And again, "Our law is, in the most fundamental points of doctrine and practice respecting the law of ownership and the effect of possession of moveables, essentially different from the law of England, and we are apt to forget our own very clear and far superior rules"—*Anderson v. Buchanan* (1848), 11 D. 270 at p. 274.

⁶ Bell's *Com.* i. 178.

⁷ Bell writes in 1826, and evidently refers to *Corwan v. Spence* (1824), 8 Sh. 42.

⁸ Bell's *Com.* i. 273; see also *Com.* i. 258.

Sect. 17.

the Mercantile Law Amendment Act of 1856, as "an unhappy and unjust consequence of the general principle of the Scottish law."¹

Views of the Bench.

Similar views as to the necessity or propriety of a relaxation of the rigid rule have frequently been expressed from the Bench, *e.g.* by Lord Ivory in an oft-quoted passage where he says "creditors are bound to know that many honest occasions of possession may arise in the daily complications of human affairs without any radical title of property on which they would be safe to rely as a ground of credit."² Lord Justice-Clerk Moncreiff in 1882 summed up the effect of modern case law by the statement that the doctrine of reputed ownership "is no longer of much importance,"³ a result which requires careful consideration in view of the extensive change in the Scottish law of possession introduced by the present Act. Thus it may be doubted if, in consequence of the new doctrine of the passing of the property by the contract without change of possession, the just rights of creditors are sufficiently protected by the ordinary common-law rules or by the provisions of Sect. 25. The last-mentioned provisions form a partial return to the doctrine, but they only relate to the case of a particular purchaser or pledgee. The general creditors of the seller or buyer are not protected, and the question therefore arises whether it may not be expedient

Effect upon rights of creditors.

¹ Bell on *Sale* (1844), p. 13. The view here expressed was strongly condemned by Lord Justice-Clerk Hope immediately after the publication of Bell's work—*Boak v. Megget* (1844), 6 D. 662 at p. 668.

² In *Shearer v. Christie* (1842), 5 D. 132 at p. 136. The same statement was repeated by Lord Ivory as Lord Ordinary in *Anderson v. Buchanan* (1848), 11 D. 270 at p. 274, and is quoted with approval by Lord Justice-Clerk Moncreiff in *Orr's Trustee v. Tullis* (1870), 8 Macp. 936 at p. 946. It is to be observed, however, that in both of the cases in which Lord Ivory, as Lord Ordinary, expressed his views, he was overruled by the Court.

³ In *Robertson v. M'Intyre* (1882), 9 Ret. 772 at p. 778. Reputed ownership was fully discussed by Lord Cowan and Lord Neaves in *Orr's Trustee v. Tullis* (1870), 8 Macp. 936. See also *Mitchell v. Hays and Sons* (1894), 21 Ret. 600. Lord Blackburn, however, assumes that reputed ownership still exists in a practical form in the law of Scotland. "If," he says, "you can show that the man who has acquired the *jus ad rem* has allowed the vendor to keep possession of the goods in such a way as is quite inconsistent with his *jus ad rem* it seems very reasonable indeed to say that that shall be considered as analogous to a case of reputed ownership, and that being so the Mercantile Law (Scotland) Amendment Act does not take the goods out of it."—In *M'Bain v. Wallace and Co.* (1881), 8 Ret. H.L. at p. 113.

to extend to Scotland the *statutory* reputed ownership which for centuries has formed part of the English bankruptcy code.¹

It is not altogether in consequence of the new rule introduced into Scotland that the interests of creditors seem to require further protection. A condition suspensive of the passing of the property has long been recognised in Scotland² as well as in England,³ and has been given effect to in such contracts as hire-purchase, where the aim of the seller is to prevent the property passing to the buyer, and being carried off by assignees or creditors before payment of all the instalments of the price. The seller's rights do not conflict with those of third parties until he gives delivery, but, after the buyer obtains possession, he may fraudulently sell or pledge to third parties, or he may incur debt on the faith of the ownership of the goods. A remedy for the hardship involved in such cases as *Murdoch and Co. Ltd. v. Greig*⁴ (1889), was intended under the provisions of the Factors Act 1889,⁵ repeated in Sect. 25 (2) of this Act,⁶

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Suggested
statutory
reputed
ownership.

Hire-purchase
etc.

¹ It was introduced by the Statute 21 James I. c. 19 (1623), and in its present form will be found in Sect. 44 of the English Bankruptcy Act of 1883 (46 & 47 Vict. c. 52). As to reputed ownership in a question with the creditors of the reputed owner, see remarks of M. P. Brown (*Sale*, p. 27, note).

² Stair, i. 14. 4 and 5; Ersk. iii. 3. 11; Bell's *Com.* i. 258; M. P. Brown, 43. The passage from M. P. Brown is quoted with approval by Lord President Inglis in *Murdoch and Co. Ltd. v. Greig* (1889), 16 Ret. 396 at p. 401. See also cases in Appendix II. *post*, p. 327.

³ See *M'Entire v. Crossley*, H.L., 13th May 1895, Law Times, vol. xcix. p. 61.

⁴ 16 Ret. 396.

⁵ 52 & 53 Vict. c. 45, Sect. 9.

⁶ In *Lee v. Butler* [1893], 2 Q.B. 318, a contract of hire-purchase was held to be an agreement to sell, there being an absolute obligation on the part of the hire-purchaser to complete the instalments of so-called hire and thus become owner. This decision was approved of by the House of Lords in *Helby v. Matthews*, 30th May 1895, 11 Times Law Reports, 446. In *Murdoch and Co. Ltd. v. Greig*, the Court of Session expressly held the agreement to be a sale, and yet a *bond-fide* purchaser at a public auction was held bound to restore the article to the seller, in respect of a latent condition by which the passing of the property was suspended. This decision is no longer law, being covered by Sect. 9 of the Factors Act 1889 and Sect. 25 (2) of this Act as interpreted by *Lee v. Butler*, *supra*. In *Helby v. Matthews* above referred to there was a clause in the agreement that the hirer might at any time terminate the hiring by delivering up the article hired (a piano) to the owner without being liable for more than the arrears of hire. This was held by the House of Lords (reversing the decision of the Court of Appeal) to distinguish the case from *Lee v. Butler*. It was said to form a real case of hire, and therefore to be beyond the scope of the present Act, but the judgment is open to the observation that the hirer's option to treat the contract as either hire or sale extends to an option to treat the payments already made as either hire or

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but a recent House of Lords judgment shows that the remedy is very imperfect, and in any event the general creditors of the hire-purchaser are still unprotected.

Sale on approval, etc.

The condition in the case of hire-purchase affects the passing of the property, but does not make the sale itself conditional. It therefore differs in this respect from "sale on approval" or "sale or return," in neither of which is there any sale if the event forming the condition does not happen.¹

Mortgage, etc.
Bills of sale.

A transfer of property without transfer of possession does not apply to "any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security."² The law of Scotland, as affecting a security in the form of a sale, has, however, been much disturbed of recent years, and is not yet well settled.³ There is nothing in the law of Scotland analogous to the English Bill of Sale, by which a statutory method is provided of securing advances over moveables by means of registration.⁴ Campbell, in his work on the *Sale of Goods*,⁵ is of opinion that such a statutory provision is "unnecessary in Scotland: 1st, because in Scotland the doctrine of reputed ownership exists independently of statute . . .; and 2ndly, by reason of the principle that possession is necessary to transfer the ownership in moveables." But this author's argument does not seem to be supported by the Mercantile Law Amendment Act, Scotland, 1856,⁶ or by the cases of *Wyper v. Harveys*⁷ (1861), *M'Bain v. Wallace*⁸ (1881), and *Edmond v. Mowat*⁹ (1868), on which he founds.¹⁰

instalments of a price. The previous Factors Acts did not affect hire-purchase, because they only dealt with documents of title, not with the goods themselves. See Com., Sect. 25 *post*, p. 124.

² Sect. 61 (4).

¹ See Com., Sect. 18 *post*, p. 94.

³ See Com., Sect. 61 *post*, p. 276.

⁴ The first Bills of Sale Act, 17 & 18 Vict. c. 36 (1854) formed the foundation of many of the decisions. This Act, as well as an amending Act in 1866 (29 & 30 Vict. c. 96), was repealed by the Act of 1878 (41 & 42 Vict. c. 31). A similar Act was passed for Ireland in 1879 (42 & 43 Vict. c. 50). The English Act was amended in 1882 (45 & 46 Vict. c. 43) and the Irish Act in 1883 (46 Vict. c. 7). The Acts were further amended by short Acts in 1890 (53 & 54 Vict. c. 53) and 1891 (54 & 55 Vict. c. 85). For a synopsis of the various Acts and the numerous decisions founded upon them, see Campbell on *Sale of Goods*, 2nd ed. (1891), pp. 156 to 214.

⁵ 2nd ed. (1891), p. 159.

⁶ 19 & 20 Vict. c. 60.

⁷ 23 D. 606.

⁸ 8 Ret. H.L. 106.

⁹ 7 Macp. 59.

¹⁰ See Campbell, pp. 154 to 159. In *Coote v. Jacks* (1872), L.R. 13 Eq. 597,

It was held in a recent case,¹ that where a dealer in **Sect. 17.** musical instruments had let out pianos on the hire-purchase system, and had afterwards by an indenture assigned both pianos and hire-purchase agreements in security of an advance, the assignation, so far as regards the hire-purchase agreements, was not invalid because not registered as a bill of sale. It was admittedly invalid as regards the pianos themselves, and it was argued that the deed must stand or fall as a whole, but this contention was negatived. "Upon the face of the instrument there was an assignment of proprietary rights and also of certain contractual rights. . . . Could two things which were different be said to be inseparable? Each gave different rights and different remedies. . . . If different instruments had been used to assign each, the Bills of Sale Acts would not be applicable to the instrument assigning the contractual rights."²

So far as the law of England is concerned the section is declaratory. Illustrations will be found in connection with the immediately succeeding section.³ **General illustrations.**

Rules for Ascertaining Intention.

18. Unless a different intention appears, the **Sect. 18.** following are rules for ascertaining the intention of the parties^(a) as to the time at which the property^(b) in the goods^(b) is to pass to the buyer. **RULES FOR ASCERTAINING INTENTION.**

a minute of lease of heritage in Scotland was deposited by an English debtor with an English creditor, along with an agreement pledging all furniture and effects in the leased premises in security of an English debt. The pledge was clearly ineffectual according to the law of Scotland, and it was maintained that to be effectual in England it was necessary that the agreement should be registered in terms of the Bills of Sale Act of 1854. It was held by Bacon, V. C., that as the Act did not extend to Scotland registration was unnecessary, and the curious result followed that a security became available to the creditor which was invalid on different grounds in both countries.

¹ *In re Isaacson, ex parte The Trustees*, Ct. of App. (7th December 1894), 11 Times Law Rep. 101.

² Per Lord Esher, M.R., 11 Times Law Rep. at p. 102. Lord Esher's views are supported by *In re Burdett, ex parte Byrne* (1888), 20 Q. B. D. 310, and *Cochrane v. Entwistle* (1890), 25 Q. B. D. 116.

³ Sect. 18 *post*, p. 89.

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Rule 1.—Where there is an unconditional contract for the sale of specific goods,^(a) in a deliverable state,^(a) the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment^(a) or the time of delivery,^(a) or both,^(c) be postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller^(a) is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.^(a)

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller^(a) is bound to weigh, measure,^(a) test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price,^(a) the property does not pass until such act or thing be done, and the buyer has notice thereof.^(a)

Rule 4.—When goods are delivered to the buyer on approval^(a) or “on sale or return”^(a) or other similar terms the property therein passes to the buyer:—

(a.) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(b.) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return

of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.^(a) What is a reasonable time is a question of fact.^(a) Sect. 18.

Rule 5.—(1.) Where there is a contract for the sale of unascertained or future goods^(a) by description,^(a) and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.^(a)

(2.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier^(a) (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal,^(a) he is deemed to have unconditionally appropriated the goods to the contract.

NOTES.

(a) "*Intention of the parties.*" The rules of this section form an expansion of Sect. 17.

(b) "*Property*"—"goods"—"*specific goods.*" Defined Sect. 62 (1).

(c) "*Deliverable state.*" See Sect. 62 (4).

(d) "*Postponed time of payment.*" As where credit is given, with or without a bill for the price.¹

¹ *E.g. Somerville and Co. v. Stein* (1796), 3 Pat. App. 462.

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(e) *Postponed time of delivery.* As in *Gibson v. Forbes*¹ (1833). It was found difficult to square this case with the principles of Scottish law, and it has therefore been looked upon as exceptional and doubtful.² The doubt seems to be removed by this Act, but see judgment of North, J., in *Nicholson v. Harper* [1895], 11 Times Law Rep. 435. In *Distillers Co. Ltd. v. Russell and Co.'s Trustees*³ (1889), the price was paid at once, but the goods remained undelivered for five years. It was held under the former law of Scotland that the property had not passed to the buyer. Under the rule of this section the property would have passed at the date of the contract, and the case is therefore no longer authoritative. "Delivery" defined Sect. 62 (1).

(f) *Postponement of both payment and delivery.* Delivery is often made to depend upon payment,⁴ but the protection to the seller afforded by withholding delivery is now confined to a lien for the price of the goods sold. He is not entitled, as formerly in Scotland, to retain for a general balance.⁵

(g) The seller's obligations are alone taken into account.⁶ The contract may impose a duty on the buyer, e.g. to sever industrial growing crops, or to fell growing wood,⁷ but this will not prevent the passing of the property,⁸ unless so arranged. If the duty imposed on the seller is to be done after delivery, it will not prevent the property passing by delivery, even if it has not passed by the contract itself.⁹ A familiar example is where a seller engages to keep a watch or clock in repair for a certain time.¹⁰

(h) The notice to the buyer here provided was added to the bill on a suggestion from Scotland. It seemed inequitable that the buyer should be liable to undertake risk of which he was ignorant. It is not, however, provided that the seller give notice, and it seems sufficient if the buyer is cognisant of the act or thing being done.

(i) In international contracts where weights or measures differ, questions may arise as to which standard is to rule.¹¹

¹ 11 Sh. 916.

² See remarks by Rose—*Leading Cases (Com. Law)*, ii. 567.

³ 16 Ret. 479.

⁴ As in *Smith v. Allan and Poynter* (1859), 22 D. 208.

⁵ The former rule is illustrated by *M'Naughton v. Baird and Co.* (1852), 24 Sc. Jur. 623.

⁶ See *Turley v. Bates* (1863), 2 H. & C. 200.

⁷ As in *Duff v. Brown* (14th February 1814), F.C., Rev. H. of L. (1817), 6 Pat. App. 332.

⁸ "If the things to be done are entirely in favour of the purchaser, and such as he may dispense with, they cannot affect constructive delivery."—Per Lord Deas in *Black v. Incorporation of Bakers* (1867), 6 Macp. 136 at p. 143.

⁹ *Hammond v. Anderson* (1804), 1 B. & P. N.R. 69; *Greaves v. Hepke* (1818), 2 B. & Ald. 131.

¹⁰ Benjamin on *Sale*, p. 291.

¹¹ As in *Schuurmans v. Stephen* (1833), 11 Sh. 779. See also *Ainslie v. Murray* (1881), 8 Ret. 636.

(j) But the mere absence of a fixed price in stated figures will not prevent the property passing, if there are *data* for fixing it, *e.g.* where goods are sold at so much per ton and the total tonnage is ascertained.¹ Sect. 18.

(k) "*Approval*"—"sale or return." See *COM. infra*, p. 94.

(l) "*Reasonable time*." This applies equally to "sale on approval" and to "sale or return." Lord Young suggests that it is more appropriate to the former contract, and that "sale or return" is more of the nature of agency.² The distinction, however, has not been recognised. See "sale or return" defined in *Moss v. Sweet*³ (1851). See also *COM. infra*, p. 94.

(m) "*Reasonable time is a question of fact*." There is a general provision to this effect in Sect. 56. The special provision is superfluous.

(n) "*Future goods*," *i.e.* "goods to be manufactured or acquired by the seller after the making of the contract of sale" [Sect. 62 (1)].

(o) "*Description*." See Sects. 13 and 14 (2) and NOTE (a) *ante*, p. 62.

(p) The assent of both parties is required to appropriation in order to pass the property. Such assent is practically a second and subsidiary contract.

(q) "*Custodier*." This word was introduced in applying the Act to Scotland. Sect. 62 (1) provides that "bailee" in Scotland includes custodier; and the repetition of "custodier" throughout the Act was therefore unnecessary.

(r) *Reservation of right of disposal*. See Sect. 19.

COMMENTARY.

The first rule of this section deals with an unconditional contract; the second, third, and fourth deal with different kinds of conditions; and the fifth relates to the appropriation of goods not originally specific. General effect of rules.

Rule 1.—This rule embodies a change in the law of Scotland, to which particular reference has been made in connection with the preceding section.⁴ The law of England is not altered, and has been thus expressed: "By the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. . . . Where Rule 1.

¹ See *Hansen v. Craig and Rose* (1859), 21 D. 432.

² 15 Ret. at p. 989.

³ 16 Q.B. 493.

⁴ *Ante*, p. 80.

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there is a sale of goods generally, no property in them passes till delivery;¹ because until then the very goods sold are not ascertained."²

Rules 2 and 3.

Transfer of risk in Scotland analogous to transfer of property in England.

Scottish cases as to risk.

Rules 2 and 3.—The former law of Scotland in regard to passing the property prevents Scottish cases from being cited as direct illustrations of these rules. But there is at least a strong analogy between the circumstances which in Scotland sufficed to transfer the risk and those which in England passed and still continue to pass both property and risk. Indeed the leading opinions in the House of Lords in *Seath and Co. v. Moore*³ (1886) assume the circumstances in each case to be identical.⁴ In this view the Scottish cases of *Hansen v. Craig and Rose*⁵ (1859), *Anderson and Crompton v. Walls and Co.*⁶ (1870), and *Walker v. Langdales Chemical Co.*⁷ (1873) illustrate Rules 2 and 3. If the question in these cases had related to the passing of the property as well as of the risk, the judgments would have been the same in England, and would now be the same in

¹ Or appropriation. See Rule 5 (1).

² Per Parke, J., in *Dixon v. Yates* (1838), 5 B. & Ad. 313 at p. 340. "Generally where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk if nothing remains to be done to the goods, although he cannot take them away without paying the price."—Per Bayley, J., in *Simmons v. Swift* (1826), 5 B. & C. 857 at p. 862. See also *Tarling v. Baxter* (1827), 6 B. & C. 360; *Gilmour v. Supple* (1858), 11 Moo. P.C. 551, per Sir C. Cresswell at p. 566; *Calcutta Co. v. De Mattos* (1863), 32 L.J. Q.B. 322, per Blackburn, J., at p. 328.

³ 13 Ret. H.L. 57.

⁴ "By the law of England the appropriation of a specific chattel by the vendor, and the agreement of the vendee to take that specific chattel and pay the stipulated price, have the effect of vesting the property of the chattel in the vendee. In Scotland, the effect of such an appropriation and acceptance by the contracting parties is to perfect the contract of sale, and to give the purchaser a personal right to demand delivery of the specific chattel from the seller. When the contract is thus perfected the risk is transferred to the purchaser . . . but the property of the chattel does not pass to him until he has obtained delivery under the contract."—Per Lord Watson, 13 Ret. H.L. at p. 64. See also Lord Blackburn to the same effect at pp. 59 and 61. Lord M'Laren, in his notes to *Bell's Commentaries* (i. 199) founds on the opinions of the late Lord President Inglis expressed in *Hansen v. Craig and Rose* (1859), 21 D. 432, and *Black v. Incorporation of Bakers* (1867), 6 Macp. 136, as authority for the statement that the risk and *jus ad rem specificam* may pass with us in many cases in which, under the English rules, the general property and risk would not pass. See also notes at pp. 461 and 473, and Guthrie's notes to *Bell's Prin.*, Sect. 87. The Lord President's views are further referred to *infra*, p. 92.

⁵ 21 D. 432.

⁶ 9 Macp. 122.

⁷ 11 Macp. 906.

Scotland. *Hansen's Case*¹ formed a negative instance of both rules, it being found that nothing was wanting either to put the goods into a deliverable state or to ascertain the price.² *Anderson's Case*³ illustrates Rule 2, the question being whether the goods were made specific and put into a deliverable state by separation from the bulk; and *Walker's Case*⁴ illustrates Rule 3, it being held that the price could not be ascertained until the subject was weighed on delivery.

In *Black v. Incorporation of Bakers*⁵ (1867) the circumstances were special, but the soundness of the judgment, even under the former law of Scotland, may be doubted. The goods sold were the seconds, thirds, and bran to be produced from the milling of a specified quantity of wheat in the hands of a miller, it being part of the contract that the seller should put these products into the buyer's sacks and deliver them free. The case turned upon the effect of a delivery order by the buyer in favour of a sub-buyer in operating constructive delivery so as to exclude the original seller's right of retention for a balance of the price remaining unpaid. It was held that constructive delivery was complete, although the products had neither been actually delivered nor put into the purchaser's sacks, and that the sub-buyer was therefore entitled to carry them off without regard to the seller's claim. Such a result could not be reached under the present section. It is to be noticed—(1) No account was taken of the seller's contractual duties remaining unperformed, the law on this subject, as explained by Bell, being ignored or set aside.⁶ (2) The order, in so

Black v. Incorporation of Bakers.

¹ 21 D. 432.

² "I hold that the sale of a mass of fungibles, certain, and known by general description, but of unascertained extent, at a rate of price according to measure, weight, or number, is not a complete personal contract of sale such as will operate a transfer of the risk to the buyer until the mass have been measured, weighed, or counted, and so the price ascertained."—Per Lord Justice-Clerk Inglis, 21 D. at p. 440.

³ 9 Macp. 122.

⁴ 11 Macp. 906.

⁵ 6 Macp. 136.

⁶ "Where anything remains to be done by the sellers . . . in order to put the commodity sold into a deliverable state, the transfer is not completed by a delivery note given to the buyer, addressed to the keeper of the goods, with notice to the custodian, or even by a transfer in the custodian's books."—Bell's *Com.* i. 197.

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far as it was held to operate constructive delivery, was inconsistent with the contract, the seller being bound under the contract to deliver to the buyer himself. It is no answer to say that this provision was in favour of the buyer alone, and might therefore be waived by him. In the circumstances of the case, it was a provision very much in favour of the seller.¹ (3) The rigid effect ascribed to an intimated delivery order, without regard to the conditions of the contract, seems founded on the analogy of a transfer of incorporeal moveables in Scotland by means of an intimated assignation,² but it excludes the idea of the custodian's consent to hold for the buyer, which lies at the very root of constructive delivery.³ The effect given to the delivery order was as extreme in one direction as the effect denied to a similar delivery order in the *Distillers Company's Case*⁴ was extreme in the other. (4) Lord President Inglis, who gave the leading opinion, assumed that, though in the opinion of the Court the property was transferred, the risk (being incapable of transfer in the same manner) remained with the seller.⁵ In Scots law the transfer of the risk often preceded the transfer of the property, and the result was anomalous, but to invert the order and to continue the

¹ According to Lord Deas (6 Macp. at p. 143) any result which excludes constructive delivery "plainly will not do." (Why not?)

² The same analogy led the Court into a labyrinth of legal difficulties in *Wyper v. Harveys* (1861), 23 D. 606. Bell, on the authority of *Auld v. Hall and Co.* (12th June 1811), F.C., says that a change of custody by notice is the undoubted law of Scotland (Bell's *Com.* i. 195). M'Laren in a note to this passage says, "The point appears to have been assumed though never expressly decided nor perhaps questioned." See *Eadie v. Mackinlay* (7th February 1815), F.C.

³ An acknowledgment is now required in addition to mere intimation, Sect. 29 (3). See *COM. post*, p. 139.

⁴ *Distillers Co. Ltd. v. Russell and Co.'s Trustee* (1889), 16 Ret. 479. See note (e) *supra*.

⁵ "I need hardly say that there is no room for the distinction suggested by the Sheriff-Substitute between that portion of the goods which was in the seller's bags and that which was in the buyer's. Such circumstances are material in questions of *periculum* where the subject of sale is undelivered in the hands of the seller or his agents . . . but where the subject of sale is in the hands of an independent third party, and a delivery order by the seller in favour of the buyer has been duly intimated to the custodian by the buyer, constructive delivery will take place *whatever may be the precise condition of the goods* . . . even though the goods be lying in such a state that some preliminary operation is necessary to put them in a state for delivery"—6 Macp. at p. 141.

seller's risk in regard to goods no longer his own, and over which he had not even a lien for the unpaid price, was more anomalous still. **Sect. 18.**

In English law, Rules 2 and 3 are thus stated by Lord Blackburn. "The intention of parties must be collected from the whole agreement, and the courts have since the beginning of this century adopted for this purpose some rules of construction which are perhaps a little artificial. . . . They are twofold: the first is, that where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property. The second is that where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods; the performance of those things, also, shall be a condition precedent to the transfer of the property, although the individual goods be ascertained and they are in a state in which they ought to be accepted."¹ In regard to the first of these rules (Rule 2 of this section) Lord Blackburn thinks it is founded on reason. "In general," he says, "it is for the benefit of the vendor that the property should pass; the risk of loss is thereby transferred to the purchaser, and as the vendor may still retain possession of the goods, so as to retain a security for payment of the price, the transference of the property is to the vendor pure gain."² Having this privilege it is reasonable that where by the agreement the vendor is to do something, it should be done before he obtains the benefit of the transfer. The second rule (Rule 3 of this section) Lord Blackburn thinks is "somewhat hastily adopted from the civil law." . . . "As it must in general be intended that both parties shall concur in the act of weighing, when the

Statement of
the law of
England em-
bodied in
Rules 2 and 3.

¹ Blackburn on *Sale*, p. 174.

² *Ibid.* p. 175.

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price is to depend upon the weight, there seems little reason why, in cases in which the specific goods are agreed upon, it should be supposed to be the intention of the parties to render the delay of that act in which the buyer is to concur, beneficial to him. Whilst the price remains unascertained the sale is clearly not for a certain sum of money, and therefore does not come within the civilian's definition of a perfect sale transferring the risk and gain of the thing sold; but the English law does not require that the consideration for a bargain and sale should be in moneys numbered, provided it be of value."¹ Lord Blackburn, however, admits that both rules are now firmly established in English law. Rule 3 was established in Scotland before the Act,² which is not surprising, if, as suggested, it is founded on the civil law to which the law of Scotland is closely allied.³

Rule 4.—
Sale on ap-
proval.
Sale or return.

Rule 4.—The contracts of "sale on approval" and "sale or return" are conditional, the condition being suspensive of the sale itself, and not merely of the passing of the property.⁴ The condition in the contract of sale or return has been occasionally treated as resolute,⁵ e.g. by Lord Justice-Clerk Moncreiff in *Brown v. Marr, Barclay, etc.*⁶ (1880); but this case was practically overruled by *Macdonald v. Western*⁷ (1888), and there seems a strong balance of authority in favour of a suspensive rather than a resolute sale.⁸ But supposing the sale to be suspended

¹ Blackburn on *Sale*, pp. 175, 176.

² See *Walker v. Langdales Chemical Co.* (1873), 11 Macp. 906.

³ The following English cases illustrate the two rules:—Rule 2.—*Rugg v. Minett* (1809), 1 East 210; *Acraman v. Morrice* (1849), 8 C.B. 449; *Anderson v. Morice* (1876), H. of L. 1 App. Cas. 713. Rule 3.—*Hanson v. Meyer* (1805), 6 East 614; *Zagury v. Furnell* (1809), 2 Camp. 240; *Simmons v. Swift* (1826), 5 B. & C. 857; *Logan v. Le Mesurier* (1847), 6 Moo. P.C. 116; *Gilmour v. Supple* (1858), 11 Moo. P.C. 551; *Tansley v. Turner* (1835), 2 Scott 238; *Cooper v. Bill* (1865), 34 L.J. Ex. 161, 8 H. & C. 722.

⁴ Bell's *Com.* i. 471 (sale on approval), i. 288 (sale or return). See in illustration, *Pinder and Co. v. Fullarton* (1889), Sh. Ct. Glasgow, Guthrie's Sel. Ca. 2nd ser. 528. The mere fact that the goods are accompanied by an invoice bearing the words "bought of" will not exclude proof that the contract was one of "sale or return"—*Woodrow v. Patterson and Co.* (1845), 7 D. 385.

⁵ As to resolute condition, see *ante*, p. 46.

⁶ 7 Ret. 427 at p. 433.

⁷ 15 Ret. 988.

⁸ Lord M'Laren in his notes to Bell's *Com.* (i. 289) favours a resolute condition, and founds upon a *dictum* of Gibb, C. J., in *Gibson v. Bray* (1817)

for a reasonable time after delivery, a person *bonâ fide*, Sect. 18. purchasing or receiving in pledge goods held on approval, or receiving in pledge goods held by the contract of sale or return¹ may possibly be protected by Sect. 25 (2) of this Act, or, failing that section, then by Sect. 2 of the Factors Act 1889,² extended to Scotland by the Factors (Scotland) Act 1890.³ It is doubtful, however, if under the Factors Act the holder of goods on approval, or on sale or return, will come under the definition of a "mercantile agent."⁴

English illustrations of Rule 4 will be found below.⁵

Rule 5.—In many cases what is called "appropriation" is simply actual or constructive delivery, but goods may be

Rule 5.—
Appropriation.

1 Holt 556, and a passage in Parson on *Contracts* (5th ed. i. 539). But the remark of the Chief Justice was *obiter*, judgment being given on a different ground, while the authorities quoted by Parson do not bear out his text. They decide that a party holding on sale or return (or on approval) may be sued as for goods "*sold and delivered*" if he allow an unreasonable time to elapse before returning; but it does not follow that there is a sale, or that the property passes by delivery, before the holder is in fault. See *Bailey v. Gouldsmith* (1790), Peake Ca. 56; *Neate v. Ball* (1801) 2 East 116; *Beverley v. Lincoln Gas Light Co.* (1837) 6 A. & E. 829; *Moss v. Sweet* (1851) 16 Q.B. 498. See also *Pinder and Co. v. Fullarton* (1889), Sh. Ct. Glas., Guth. Sel. Ca. 2nd ser. 528. The view of a suspensive condition is supported by Bell (*Com. i.* 288; *Prin.*, Sect. 109); M. P. Brown (*Sale*, p. 37); Brodie (*Com. on Stair*, pp. 901, 909); More (*Com. on Stair*, p. lxxxviii); Story (*Sale*, Sect. 249). In *Mitchell v. Heys and Sons* (1894), 21 Ret. 600, the case of *Brown v. Marr, Barclay, etc.* is treated as authoritative by the Lord Ordinary (at p. 604) and is distinguished by Lord Kinnear (at p. 613); but no light is thrown on the principles by which it is supposed to be governed. The phrase "*sale and return*," which is sometimes used, seems allied to the idea of a resolute condition, and is generally employed where such a condition is suggested.

¹ "Whether a retail dealer taking goods on 'sale or return' by dealing with them in some other way than by selling them may pass the property in them I am not prepared to determine. I do not think the recipient can be said to have got them on a contract of 'pawn or return.'"—Per Lord Young in *Macdonald v. Western* (1888), 15 Ret. 988 at p. 990.

² 52 & 53 Vict. c. 45. Text in Appendix I. *post*, p. 296.

³ 53 & 54 Vict. c. 40. Text in Appendix I. *post*, p. 302. These statutes are specially referred to in the interpretation clause of this Act, Sect. 62 (1).

⁴ 52 & 53 Vict. c. 45, Sect. 1 (1). See *Wood v. Rowcliffe* (1846), 6 Hare 183; *Lamb v. Attenborough* (1862), 1 B. & S. 831; *Hayman v. Flecker* (1863), 13 C.B. N.S. 519; *Cole v. North-Western Bank* (1875), L.R. 10 C.P. 354; *Hastings v. Pearson* (1893), 1 Q.B. 62.

⁵ *Bailey v. Gouldsmith* (1790), Peake Ca. 56; *Neate v. Ball* (1801), 2 East 116; *Humphries v. Carvalho* (1812), 16 East 45; *Parker v. Palmer* (1821), 4 B. & Ald. 387; *Swain v. Shepherd* (1832), 1 M. & Rob. 223; *Beverley v. Lincoln Gas Light Co.* (1837), 6 A. & E. 829; *Moss v. Sweet* (1851), 16 Q.B. 498; *Towle v. White* (1870), 6 Ch. 397; *Affid. H. of L.* 21 W.R. 465; *Ex parte Wingfield* (1879), 10 Ch. D. 591; *Ray v. Barker* (1879), 4 Ex. D. 279; *Elphick v. Barnes* (1880), 5 C.P.D. 321.

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appropriated without being delivered. If, for example, an order is given for the manufacture of an article, and the manufacturer makes two of the same kind, the executory contract may be changed into a bargain and sale by selection on the part of the buyer without actual delivery to him.¹ "The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession."²

Shipbuilding contracts.

Simpson v. Duncanson's Creditors.

The apparent exception to Rule 2 in the case of a shipbuilding contract is explained in England on the theory of appropriation.³ The same result was reached in Scotland in 1786 in *Simpson v. Duncanson's Creditors*,⁴ which for nearly a century was looked upon as an authoritative and leading case.⁵ Several English writers go the length of suggesting that this case lay at the foundation of the English rule,⁶ and it must at least be admitted that its date was long anterior to the settlement of the question in England. The English writers referred to, assume that *Simpson's Case* was founded on "appropriation," as in the corresponding English decisions. This certainly derives some colour from the expressed opinions of the judges so far as

¹ "A tradesman often finishes goods which he is making in pursuance of an order given by one person and sells them to another. If the first customer has other goods made for him within the stipulated time he has no right to complain."—Per Heath, J., in *Mucklow v. Mangles* (1803), 1 Taunt. 318 at p. 320. But it would be otherwise if the goods were appropriated.

² Per Park, J. (Lord Wensleydale), in *Dixon v. Yates* (1833), 5 B. & Ad. 313 at p. 340.

³ The foundation of the decision in *Woods v. Russell* (1822), 5 B. & Ald. 942 "was that as, by the contract, given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price the ship was irrevocably appropriated to the person paying the money."—Per Bayley, J., in *Atkinson v. Bell* (1828), 8 B. & C. 277 at p. 282. This view was approved in *Clarke v. Spence* (1836), 4 A. & E. 448, and was held by the House of Lords as settled in *Seath and Co. v. Moore* (1886), 13 Ret. H.L. 57.

⁴ Mor. 14204. The report in Morrison is meagre, but is supplemented to some extent by Bell (*Com. i.* 189) and by Lord Hailes (*Decisions*, p. 1000).

⁵ It is so spoken of by Lord Justice-Clerk Moncreiff in *M'Bain v. Wallace and Co.* (1887), 8 Ret. 360 at p. 368.

⁶ Wilkinson's *Law of Shipping* (1843), p. 30, note; Abbott on *Shipping*, 7th ed. p. 3; Foard on *Merchant Shipping* (1880), p. 158. Lord Justice-Clerk Moncreiff (8 Ret. at p. 368) erroneously attributes the statement in Abbott to the author himself (Lord Tenterden). The real author is Serjeant Shee, the editor of the seventh edition, which appeared in 1844.

reported, although such a principle seems inconsistent **Sect. 18.** with the primary maxims of the law of Scotland before this Act. It was argued by the party standing in the position of purchaser that the shipbuilder was from the first a mere mandatory employed to perform certain work and to furnish materials, and that he consequently never had any right of property in the thing called a ship. The materials in this view became the purchaser's, *specificatione*, from the moment of their being applied to the vessel.¹ So far as can be gathered from the imperfect reports, only one out of seven judges who expressed an opinion, held this view. Three judges seem to have treated the passing of the property as matter of contract (intention?), thus anticipating by a century the assimilation with English law which has now taken place. Two of these, according to the report of Bell,² came even nearer to the principles of English law by holding that in terms of the contract there was an "*appropriation*" of the vessel to the employer when the first instalment of the price was due.³ The case of *M'Bain v. Wallace and Co.*⁴ (1881) was decided by the Court of Session on the authority of *Simpson's Case*, but, in the House of Lords, the authority of the old case was doubted, and the decision was rested entirely on the special provisions of the Mercantile Law Amendment Act of 1856.

¹ Session papers as quoted by Brodie (*Com. on Stair*, p. 900).

² Bell's *Com.* i. 189, note. "Mr. Bell has a report of his own, but whence derived he has not been pleased to inform us" (Brodie's *Com. on Stair*, p. 904, note). In one respect, at least, Bell is inaccurate. In referring to Lord Braxfield, he calls him Lord Justice-Clerk M'Queen, whereas M'Queen did not succeed to the office till 1788. Brodie thus apologises for the great length of his criticism of this case: "Legal principles have, in my opinion, been so much violated in it, and it has led Mr. Bell to lay down on the subject what appears to me such erroneous law, that I cannot dismiss it without satisfying myself that I have cleared up every difficulty (*Com. on Stair*, p. 908, note). Brodie's view of *Simpson's Case* seems to have been adopted by the House of Lords in *M'Bain v. Wallace and Co.* (1881), 8 Ret. H.L. 106. See opinion of Lord Chancellor Selborne at p. 109, and of Lord Watson at p. 116.

³ Seven judges appear to have taken part in the discussion. Lord President Dundas and Lords Braxfield and Eakgrove founded on contract, and Lord Monboddo on "*specification*." Lord Ellielock discarded legal principle and rested his opinion on "*justice and common sense*." Lord Henderland doubted if the property were transferred at all, and Lord Stonfield entered an unqualified dissent from the judgment.

⁴ 8 Ret. 360; Affd. 8 Ret. H.L. 106.

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The English law as now embodied in Rule 5, is illustrated by the cases in the footnote.¹

Sect. 19.

**RESERVATION
OF RIGHT OF
DISPOSAL.**

19.—(1.) Where there is a contract for the sale of specific goods^(a) or where goods are subsequently appropriated to the contract,^(b) the seller may, by the terms of the contract^(c) or appropriation, reserve the right of disposal of the goods until certain conditions^(d) are fulfilled. In such case, notwithstanding the delivery^(e) of the goods to the buyer, or to a carrier or other bailee or custodian^(f) for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie*^(g) deemed to reserve the right of disposal.^(h)

(3.) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not

¹ *Mucklow v. Mangles* (1808), 1 Taunt. 318; *Dutton v. Solomonson* (1808), 3 B. & P. 582; *Bishop v. Crawshaw* (1824), 3 B. & C. 415; *Fragano v. Long* (1825), 4 B. & C. 219; *Rohde v. Thwaites* (1827), 6 B. & C. 388; *Atkinson v. Bell* (1828), 8 B. & C. 277; *Elliott v. Pybus* (1834), 10 Bing. 512; *Alexander v. Gardner* (1835), 1 Bing. N.C. 671; *Sparkes v. Marshall* (1836), 2 Bing. N.C. 761; *Bryans v. Niz* (1839), 4 M. & W. 775; *Cunliffe v. Harrison* (1851), 6 Ex. 903; *Godts v. Rose* (1855), 17 C.B. 229; *Aldridge v. Johnson* (1857), 7 E. & B. 885; *Langton v. Higgins* (1859), 4 H. & N. 402; *Browne v. Hare* (1859), 4 H. & N. 822; *Levy v. Green* (1859), 1 E. & E. 969; *Campbell v. The Mersey Docks* (1863), 14 C.B. N.S. 412; *Tregelles v. Sewell* (1863), 7 H. & N. 571; *Calcutta Co. v. De Mattos* (1863), 32 L.J. Q.B. 322; *Guth v. Lees* (1865), 3 H. & C. 558; *Ex parte Pearson* (1868), 3 Ch. 448; *Jenner v. Smith* (1869), L.R. 4 C.P. 270; *Borrowman v. Free* (1878), 4 Q.B.D. 500; *Stock v. Inglis* (1885), 12 Q.B.D. 564, 10 App. Ca. 268.

honour the bill of exchange, and if he wrongfully Sect. 19. retains the bill of lading the property in the goods does not pass to him.^(A)

NOTES.

(a) "*Specific goods.*" Defined Sect. 62 (1).

(b) "*Appropriated to the contract.*" See Sect. 18, Rule 5.

(c) "*Terms of the contract.*" This is a concrete instance of the general rule that the property passes in accordance with the intention of parties. See Sect. 17.¹

(d) As to the nature and effect of conditions, see COM., Sect. 10 *ante*, p. 46.

(e) "*Delivery.*" Defined Sect. 62 (1).

(f) "*Bailee*" in Scotland includes "*custodier*" [Sect. 62 (1)].

(g) "*Prima facie.*" It is entirely matter of intention. Thus the seller may take the bill of lading to his own order, but "as agent or on behalf of the purchaser"² or he may indorse the bill of lading and transmit it to the buyer direct,³ or even transmit it so indorsed to his own agent.⁴ In all these cases it has been held that the seller did not intend to reserve a right of disposal.

(h) Sub-sects. (2) and (3) refer to the particular case of goods shipped to the buyer,⁵ whereas sub-sect. (1) is general in its application. Sub-sect. (3) is in accordance with the previous law of Scotland, but is supposed to introduce a change in the law of England. See COM. *infra*, p. 103.

COMMENTARY.

The general effect of this section is to give statutory sanction to conditions suspensive of the passing of the property.⁶ In Scotland, before this Act, such conditions were necessarily attached to *delivery*, as it was only by delivery

Effect of delivery upon suspensive conditions in Scotland.

¹ See also Benjamin, p. 345.

² Per Cotton, L. J., in *Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. at p. 172.

³ *Wilmshurst v. Bouker* (1844), 7 M. & G. 882; *Key v. Cotesworth* (1852), 7 Ex. 595.

⁴ *Browne v. Hare* (1859), 4 H. & N. 822.

⁵ For exposition and illustration of sub-sect. (2) see Benjamin, p. 345 *et seq.* As to the general effect of a bill of lading, see COM. *infra*, p. 101.

⁶ See COM., Sect. 17 *ante*, p. 83.

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that the property in goods sold could be transferred. The importance attached to the overt act of delivery in passing the property is evidenced by many judicial utterances in Scotland. In some cases the extreme view was held that where there was a condition suspensive of the passing of the property there was, strictly speaking, no sale at all.¹ But in Scots law it was the *contract* which constituted the sale and not the passing of the property,² and thus devotion to one supposed principle of Scottish law led to another of at least equal authority and value, being entirely ignored. The obligations of parties in the cases supposed admittedly continued in force so far as unperformed, and there was therefore a binding contract which could be called by no other name than a contract of sale.

Sub-sect. (1).

The first sub-section provides that, in the case of goods originally specific or subsequently appropriated, a *jus disponendi* may be reserved by the seller so as to prevent the property passing, as it would otherwise do, at the date of the contract or the appropriation. In Scotland, as we have seen, no property passed by the mere contract or by appropriation without delivery, and even in England the change of possession by delivery is so important that it has been thought necessary in this sub-section to supplement the general provision by an express statement that even delivery to the buyer or to some one on his behalf will not pass the property so long as the conditions are unfulfilled.

Delivery as
affecting
reservation of
jus disponendi.

Previous law
of Scotland.

It has already been noticed that in modern Scots law conditions suspensive of the passing of the property by

¹ "The condition was that delivery should not pass the property until the price was paid. If that condition was legal it follows that there was no sale till the price was paid. . . . Smart never became proprietor and Hogarth never ceased to be proprietor, and as Smart became insolvent the contract never grew into a contract of sale."—Per Lord Justice-Clerk Moncreiff in *Hogarth v. Smart's Trustee* (1882), 9 Ret. 964 at p. 968. "I decline to apply the term 'contract of sale' to such a contract."—Per Lord Young in the same case, 9 Ret. at p. 968. "I am unable to understand the idea of a condition in a contract of sale in Scotland suspensive of the property passing notwithstanding delivery—that is to say, I cannot conceive a contract of sale in Scotland followed by *bond-fide* delivery, yet leaving the property unpassed."—Per Lord Young in *Clarke and Co. v. Miller and Son's Trustee* (1885), 12 Ret. 1035 at p. 1042.

² "In the law of Scotland sale is only a contract for transferring, not in itself a transference."—Bell's *Com.* i. 458.

delivery have been freely admitted.¹ Thus in *Hogarth v. Smart's Trustee*² (1882), a millwright sold a thrashing machine and erected it on the buyer's farm under a verbal agreement that the machine should remain the seller's property until the buyer was able to pay the price, and that meantime the buyer should pay a reasonable yearly sum for hire.³ The condition was held to suspend the passing of the property and to exclude the buyer's creditors.⁴

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Hogarth v. Smart's Trustee.

The second sub-section restricts the ordinary effect of a bill of lading in passing the property. A bill of lading both at common law and by statute is a document of title.⁵ "A cargo at sea," says Bowen, L. J., "while in the hands of the carrier, is necessarily incapable of physical delivery. During this period of transit and voyage the bill of lading, by the law merchant, is universally recognised as its symbol, and the endorsement and delivery of the bill of lading operates a symbolical delivery of the cargo. Property in the goods passes by such endorsement and delivery of the bill of lading whenever it is the intention of the parties that the property should pass, just as, under similar circum-

Sub-sect. (2).
Effect of bills of lading.

¹ *Com.*, Sect. 17 *ante*, p. 83.

² 9 Ret. 964.

³ It is interesting to note in this case the influence of English law and practice. In a proof led before the Sheriff-Substitute of Berwickshire the pursuer (*Hogarth*) deponed, "I hinted that it was most likely that I would have to put my name on both mill and engine as proprietor, and he (the buyer) had no objection to that. I considered that essential, and also I had seen the same thing done by English makers on machines that had been working for some years." In point of fact cards were affixed to both engine and mill inscribed "Andrew Hogarth, engineer, proprietor, Kelso." It is to be observed, however, that the English practice was designed to overcome the statutory reputed ownership which had no existence in Scotland. See *Com.*, Sect. 17 *ante*, p. 83.

⁴ See also *Murdoch and Co. Ltd. v. Greig* (1889), 16 Ret. 396. But such cases of hire-purchase are within the operation of Sect. 25 (2). The subject is referred to *ante*, p. 83.

⁵ "The assignee of a bill of lading trusts to the indorsement; the instrument is in its nature transferable; in this respect, therefore, it is similar to the case of a bill of exchange. If the consignor had intended to restrain the negotiability of it he should have confined the delivery of the goods to the vendor only; but he has made it an indorsable instrument."—Per Ashhurst, J., in *Lickbarrow v. Mason* (1787), 2 T.R. 63 at p. 71. But see Lord Loughborough's opinion *contra* in the same case (1790), 1 H.Bl. 357 at p. 359. The latter judgment was, however, reversed by the House of Lords (1793), 6 East 21. In the Factors Act 1889 [52 & 53 Vict. c. 45, Sect. 1 (4)], a bill of lading is expressly included in the expression "document of title." See also Bills of Lading Act 1855 (18 & 19 Vict. c. 111), App. *post*, p. 293; and *Com.*, Sect. 25 *post*, p. 126.

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Law of Scotland as to bills of lading.

Arnots v. Boyter.

Apparent exceptions to general rule.

Sub-sect. (3).
Law of Scotland—
Brandt and Co. v. Dickson.

Clarke and Co. v. Miller and Son's Trustee.

stances, the property would pass by an actual delivery of the goods.”¹ The law of Scotland, so far back as the middle of the eighteenth century, recognised an assignment of a “bill of lading” as operating constructive delivery,² and at least before the end of the century it further recognised an assignment by way of indorsation.³ The case of *Arnots v. Boyter*⁴ (1803) illustrates this sub-section. A seller who shipped from abroad, instead of forwarding the bill of lading to the buyer in this country, sent it to his own agent at the port of consignment, and the buyer's circumstances being suspicious, the agent was held entitled to insist upon security for the price before giving actual delivery. It has, however, been held in England that where the seller's object in taking the bill of lading to his own order was merely to guard against a threatened breach of contract by the buyer, which did not in point of fact take place, there was no reservation of the right of disposal.⁵

The law of the third sub-section seems to have been established in Scotland before the passing of the Act.⁶ In *Brandt and Co. v. Dickson*⁷ (1876), goods were forwarded on the evening of a Friday, and were delivered at the buyer's warehouse in his absence on the following day. The bill of exchange was posted for acceptance on the Saturday, and was received by the buyer on Monday morning. The same post brought the buyer intelligence, upon which he resolved to stop payment, and he therefore refused to accept the bill. It was held that the property had not passed. On the other hand, in *Clarke and Co. v. Miller and Son's Trustee*⁸ (1885), the property was held to

¹ In *Sanders v. Maclean* (1883), 11 Q.B.D. 327 at p. 341. See also to the same effect Lord Medwyn in *McClelland v. Rodger and Co.* (1842), 4 D. 646 at p. 658.

² *Buchanan and Cochran v. Swan* (1764), Mor. 14208.

³ *Bogle v. Dunmore and Co.* (1787), Mor. 14216, and other cases in Appendix II. iv. (1) *post*, p. 331. See also cases where effect was denied to a bill of lading, Appendix II. IV. (2) *post*, p. 333.

⁴ Mor. 14204.

⁵ *Joyce v. Swan* (1864), 17 C.B. N.S. 84. See also *Browne v. Hare* (1859), 4 H. & N. 822. In such cases the seller is deemed to be the buyer's agent, but the question is one of fact to be determined by judge or jury—*Van Casteel v. Booker* (1848), 2 Ex. 691.

⁶ *Brodie v. Todd and Co.* (20th May 1814), F.C.; *Carnegie and Co. v. Hutchison* (1815), Hume 704; *Hills v. Buchanan* (1786), Mor. 14200; Affd. H.L., 3 Pat. App. 47; but see *Colvin v. Short and Co.* (1857), 19 D. 890.

⁷ 3 Ret. 375.

⁸ 12 Ret. 1035.

have passed, and the goods were effectually claimed by the buyer's general creditors. In this case there was a delay of two days in forwarding the bill for acceptance, which was explained by the circumstance that the seller's agents, through whom the sale was arranged, had, in accordance with their usual practice, advised their principals in London of the sale so that they might forward the bill direct. Lord Justice-Clerk Moncreiff, who delivered judgment, and who had also given the leading opinion in *Brandt and Co.'s Case*, attempted to distinguish between the terms of the respective contracts;¹ but a much sounder distinction is embodied in the following *dictum* of the same learned judge in *Brandt and Co.'s Case*—"I think the despatch of the goods by rail, and the sending of the invoice and bill by post, were in law contemporaneous acts."²

But if the third sub-section is declaratory of the law of Scotland, it is not equally certain that it represents the previous law of England. The rule of the sub-section is perhaps intended to embody the result of the House of Lords judgment in *Shepherd v. Harrison*³ (1871), but in that case the seller took the bill of lading to his own order, and forwarded it indorsed to *his own agents*, by whom it was sent to the buyer along with the bill of exchange for acceptance. Great importance was attached, in that and other cases, to the fact that the indorsed bill of lading was not sent to the buyer direct.⁴ In the Court below, in *Shepherd v. Harrison*, the effect of direct transmission was thus stated in Cockburn, C. J. [The cases cited are] "certainly very strong indeed, and conclusive to show . . . that where the consignor sends these documents" [bill of lading and bill of exchange] "direct to

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Doubts as to previous law of England.

Shepherd v. Harrison.

¹ In *Brandt and Co.'s Case* the words were: "We confirm the sale made to you . . . draft at four months from this date." In *Clarke and Co.'s Case* the words were slightly varied, thus: "We confirm the sale made this day . . . payment by draft at three months."

² 8 Ret. at p. 381. See opinion of Lord Craighill in *Clarke and Co.'s Case*, 12 Ret. at p. 1044. ³ L.R. 5 H.L. 116.

⁴ E.g. by Lord Chelmsford in *Shepherd v. Harrison*, L.R. 5 H.L. at pp. 123, 124; by Mellish, L. J., in *Ex parte Banner* (1876), 2 Ch. D. at p. 287; and by Cotton, L. J., in *Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. at p. 172.

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Effect of sub-
sect. (3) upon
previous law.

the consignee that ought to lead to the inference, and properly lead to the inference, that he intended the consignee should have at once the disposal of the property and possession of the goods consigned, leaving to him, as a matter simply of obligation under the contract, to return the bills of exchange accepted, not as a condition precedent to the property vesting, but simply as a matter of contract."¹ If this is a correct statement of the law of England prior to the Act, the third sub-section has introduced a change, and effected assimilation to the law of Scotland. The alteration seems in accordance with true principle. Why, it may be asked, should the fact that the documents have been sent to the buyer by an *agent* of the seller infer a legal result different from that where they have been sent by the seller to the buyer direct? *Qui facit per alium facit per se*. "I think," says Lord Westbury, "the truth of the case" (*Shepherd v. Harrison*) "was this, that the two documents were originally intended to be dependent the one on the other, and that they were sent together under the conviction and in the confidence that the bill of exchange would be accepted and returned to the sender in consideration of the bill of lading."² In this statement no distinction is drawn between the act of a principal and that of an agent, and it is submitted that no such distinction should exist.³

Sect. 20.

RISK PRIMA
FACIE PASSES
WITH PRO-
PERTY.

20. Unless otherwise agreed,^(a) the goods remain at the seller's risk until the property^(b) therein is transferred to the buyer,^(c) but when the property therein is transferred to the buyer, the goods are at the

¹ L.R. 4 Q.B. at p. 208. Messrs. Ker and Pearson-Gee strongly urge that the law of England is changed by the sub-section now under notice. See their *Commentary on the Act*, pp. 140-142.

² L.R. 5 H.L. at p. 130. See also Lord Cairns at pp. 132, 133.

³ In *Godts v. Rose* (1855), 17 C.B. 229, the seller sent to the buyer a warehouse-keeper's acknowledgment to be exchanged for a cheque. The buyer kept the acknowledgment, and by its means obtained delivery, but he refused the cheque. It was held the property did not pass. The case is an illustration of sub-sect. (1), but the principle equally applies to sub-sect. (3).

buyer's risk whether delivery^(d) has been made or not. Sect. 20.

Provided that where delivery has been delayed through the fault^(e) of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred^(f) but for such fault.^(g)

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.^(h)

NOTES.

(a) "*Unless otherwise agreed.*" There is nothing to prevent the parties making a special bargain inconsistent with the general rule (Sect. 55). Thus the seller may agree to take the risk for a definite period irrespective of the passing of the property,¹ or the buyer may take the risk of specific goods which have still to be weighed, and the property in which has not yet passed to him.² In the latter case the buyer must pay the price although the property has not passed. See Sect. 49 (2).

(b) "*Property.*" Defined Sect. 62 (1).

(c) As to transfer of property to the buyer, see Sects. 17 and 18.

(d) "*Delivery.*" Defined Sect. 62 (1).

(e) "*Fault.*" Defined Sect. 62 (1).

(f) "*Might not have occurred.*" "Might" was substituted in committee for "would," and seems more accurate. See Pothier, *Vente* No. 58; French Civil Code, 1302, 1303; Stair, i. 17. 15; M. P. Brown, p. 366. If goods perish in the hands of the seller when they ought to have been in the hands of the buyer, it may

¹ As in *Martineau v. Kitching* (1872), L.R. 7 Q.B. 436.

² *Martineau v. Kitching* (*supra*). In this case the goods were paid for according to an approximate estimate, which would have been corrected by weighing had the goods not been consumed by fire. The same principle may be pushed still further. "I see no reason why a person should not agree to buy and pay for a portion of a cargo, say of sugar in bags or corn in bulk, although the actual sugar or corn to be delivered may not be ascertained before the ship is unloaded."—Per Lindley, L. J., in *Stock v. Inglis* (1884), 12 Q.B.D. 564 at p. 577.

Sect. 20.

be impossible to prove that they "would" not equally have perished had delivery taken place. The party in fault is liable if it is proved that, but for the fault, the loss "might" not have been sustained, and he can only free himself by proving that the loss must have been sustained in any event. It is practically a question of shifting the *onus* on to the party in fault. See *M'Lean v. Grant* (1805)¹; Story on Sale, Sect. 222.

(g) Although it may not be intended that delivery should pass the property (as *e.g.* in the case of hire-purchase), this proviso seems to impose the risk of accidental destruction upon a buyer (hire-purchaser) who is *in mora* in taking delivery of the article.

(h) Delivery is not (as formerly in Scotland) the only *modus transferendi domini*, and therefore the parties may respectively possess goods, the property in which has either been parted with, or has not yet been acquired.² The same might have happened under the former law of Scotland, *e.g.* where the buyer had properly rejected goods but they remained in his temporary custody.³ The involuntary agency thus arising might, by agreement, be turned into a voluntary one, subject to the general law of principal and agent.⁴

COMMENTARY.

Res perit domino.

Previous law of Scotland as to risk.

This section is simply an expansion of the maxim *res perit domino*,⁵ but it is new to Scotland, where, as already explained, the separation of the risk from the property formed a leading feature of the law of sale.⁶ In the case of specific goods, the risk passed to the purchaser at the completion of the contract, while the property did not pass till delivery.

In Scotland the separation of the risk from the property does not seem to have been established in the time of Stair (1693), who debates both sides of the question with an evident preference for continuing the risk with the

¹ Mor. App. Reparation 2.

² See, however, the effect of Sect. 25.

³ Thus the buyer of a mare warranted sound, but which died in the buyer's hands after having been unskillfully treated by him, was held barred from recovering the price—*Newlands v. Leggatt* (1885), 12 D. 820. See also *Russell v. Ferrier* (1792), Hume 675.

⁴ *Ross v. Taylor and Co.* (1823), 2 Sh. 173.

⁵ See Blackburn, p. 245; Benjamin, p. 380.

⁶ *Ante*, p. 6.

ownership,¹ but a uniform series of decisions, commencing with *Hutchison v. M'Donald*² (1744), placed the matter beyond question. The rule itself formed part of the law of Rome,³ and has been justified on the ground that, if any considerable time elapsed between the sale and the transference, some kind of change must have occurred, and as the buyer had a right to any improvements upon the specific article sold, it was only fair that he should also be burdened with the risk of deterioration and loss.⁴ Erskine put forward a theory strongly resembling the law of England. "The property," he says, "which continues in the seller till after delivery is but nominal, he is truly no better than the keeper of the subject for behoof of the purchaser."⁵ But the explanation commonly accepted was that of Pothier and Bell. According to this view, risk was a part of the law of obligation and not of transference. The seller, being debtor for the delivery of a specific subject which perished without his fault, was freed from an obligation which had become impossible, while on the other hand the buyer remained bound for the price under an independent and *possible* obligation.⁶ This theory is not more satisfactory than the others. The obligations of contracts are mutual.⁷ If the seller without fault is unable to implement his obligation to deliver, it may be a good reason for rescinding the contract, but it cannot be a reason for freeing one of the contractors and holding the other bound.⁸

Sect. 20.

Roman law as to risk.

Erskine's theory.

Explanation by Pothier and Bell of the principle of risk.

Objections.

The section embodies the law of England, and so far as risk is concerned, it also represents the former law of Scotland. Risk passed in Scotland in much the same circumstances as those in which both property and risk passed in

Effect of section in producing assimilation of the laws of England and Scotland.

¹ Stair, i. 14. 7. See also Brodie's *Com. on Stair*, p. 857, note.

² Elchies, Sale, No. 5. Lord Elchies adds the following note to his report—"The Lords determined the general point that Lord Stair doubts of, and found that the *periculum rei venditæ nondum traditæ* lies on the buyer."

³ *Just. Inst.* iii. 28. 3.

⁴ Brodie's *Stair*, p. 857.

⁵ Ersk. iii. 3. 7. He further speaks of the seller's right to retain for the price as a right of "*pledge*," a term which implies the English principle of lien, rather than the Scottish right of retention.

⁶ Pothier, *Vente*, No. 807; Bell's *Com.* i. 180.

⁷ "It is a rule in the law of contract that both parties are bound or neither."—Bell's *Com.* i. 471.

⁸ See Brodie's *Stair*, pp. 857. 858.

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England.¹ Property and risk now *prima facie* pass together in both countries, but this is brought about, not by altering the law as to passing the risk, but by assimilating the law as to passing the property.

Illustrations of
Scottish law
as to risk.
Dunlop v.
Lambert.

The law of Scotland as to risk is illustrated by numerous cases, some of which are noted below.² *Dunlop v. Lambert*³ (1839), although an appeal to the House of Lords from Scotland, established an important principle, equally applicable to England, which is thus stated by Lord Chancellor Cottenham: "It is perfectly true, generally speaking, that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk is the risk of the consignee. . . . On reference, however, to the authorities it will be found that although that is the general inference it is capable of variations. . . . Where the party undertaking to consign undertakes to deliver at a particular place the property, till it reaches that place and is delivered according to the contract, is at the risk of the person consigning⁴; so although the consignor may follow the directions of the consignee, and deliver the property to be conveyed either by a particular carrier or in the ordinary course of business, still the consignor may make such a contract with the carrier as will make the carrier liable to him. There are therefore an infinite variety of circumstances which may occur in which the ordinary rule will turn out not to be

¹ Per Lords Blackburn and Watson in *Seath and Co. v. Moore* (1886), 13 Ret. H.L. 57. See Com., Sect. 18 *ante*, p. 90.

² *Spence v. Ormiston* (1687), Mor. 3153; *Hutchison v. M'Donald* (1744), Elchies, Sale, No. 5; *Campbell v. Barry* (1748), Elchies, Sale, No. 7; *Melvil v. Robertson* (1749), Mor. 10072; *Harle v. Ogilvie* (1749), Mor. 10095; *M'Laren v. Barclay* (1777), 5 Br. Sup. 506; *Milne and Co. v. Miller* (1st Jan. 1809), F.C.; *Andrew v. Ross* (6th Dec. 1810), F.C.; *Hall and Co. v. Armstrong* (1823), 2 Sh. 358; *Dunlop v. Lambert* (1837), 15 Sh. 884, 1232, Revd. H.L. (1839), Macl. & Rob. 663; *Fleet Brothers v. Morrison* (1854), 16 D. 1122; *Hastie v. Campbell* (1857), 19 D. 557; *Hansen v. Craig and Rose* (1859), 21 D. 432; *Anderson and Crompton v. Walls and Co.* (1870), 9 Macp. 122; *Walker v. Langdales Chemical Co.* (1873), 11 Macp. 906; *Beesley and Co. v. M'Ewen* (1884), 12 Ret. 384; *Henckell Du Buisson and Co. v. Swan and Co.* (1889), 17 Ret. 252; *Brewer and Co. v. Duncan and Co.* (1892), 20 Ret. 230. See also Stair, i. 14. 7; i. 17. 5; Ersk. iii. 3. 7; M. P. Brown, 355 *et seq.*; Bell's Com. i. 179 *et seq.*; Bell's Prin., Sects. 87 *et seq.*

³ Macl. & Rob. 663; 6 Cl. & Fin. 600.

⁴ As for example in the old case of *Spence v. Ormiston* (1687), Mor. 3153, where the seller's risk continued during the transit, he having expressly undertaken to deliver at the buyer's shop in Edinburgh.

the rule to regulate the parties.”¹ Another Scottish case, that of *Melvil and Liddel v. Robertson*² (1749), is interesting as illustrating at a much earlier date the precise point presented by the English case of *The Calcutta Co. v. De Mattos*³ (1863), where Lord Blackburn says: “The parties may intend that the vendor shall deliver the goods to the carrier, and that when he has done so he shall have fulfilled his undertaking so that he shall not be liable in damages for a breach of contract if the goods do not reach their destination, and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive.”⁴ In the Scottish case the goods were not lost, but only damaged, and it was held that the seller’s risk being confined to the safe *arrival* of the goods, the buyer was bound to pay the full price. The report bears that the Court “considered the seller’s undertaking the risk in this case to have meant no more than that the buyers should be free of the risk, and not be liable unless the cargo should arrive safe.”⁵

Sect. 20.
*Melvil and
Liddel v.
Robertson.*

Transfer of Title.

21.—(1.) Subject to the provisions of this Act,^(a) where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner,^(b) the buyer acquires no better title^(c) to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell.^(d)

Sect. 21.
**SALE BY
PERSON NOT
THE OWNER.**

(2.) Provided also that nothing in this Act shall affect—

(a.) The provisions of the Factors Acts,^(e) or any enactment enabling the apparent owner of

¹ Macl. & Rob. at p. 675.

² Mor. 10072.

³ 32 L.J. Q.B. 322.

⁴ 32 L.J. Q.B. at p. 328.

⁵ Mor. 10073.

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goods to dispose of them as if he were the true owner thereof;⁽⁵⁾

- (b.) The validity of any contract of sale under any special common law or statutory power of sale⁽⁶⁾ or under the order of a court of competent jurisdiction.^(a)

NOTES.

(a) See Sects. 22 to 25 and Sect. 48 (2).

(b) "*Sale with the consent of the owner*," as by an agent on behalf of his principal, or under an agreement, express or implied, by which a power of sale is given.¹ "To make either a sale or pledge valid against the owner of the goods sold or pledged it must be shown that the seller or pledger had authority from the owner to sell or pledge as the case might be."²

(c) "*Acquires no better title*." "At common law a person in possession of goods could not confer on another any better title to the goods than he himself had."³

(d) *Owner precluded from denying authority*. "If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bond fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it."⁴ In other words, the owner is prevented by estoppel, or, in Scottish phraseology, barred *personalis exceptione*, from denying that he had given authority to sell or pledge.⁵

(e) *Factors Acts* defined Sect. 62 (1). Text in Appendix I. *post*, pp. 296, 302.

(f) In addition to the Factors Acts, see Bills of Lading Act 1855.⁶ In England a statutory reputed ownership is provided

¹ *Gough v. Wood and Co.* [1894], 1 Q.B. 713; *North-Western Bank v. Poynter, Son, and Macdonalds* (1894), 21 Ret. 513, Revd. H.L. 32 S.L.R. 245.

² Per Blackburn, J., in *Cole v. North-Western Bank* (1875), L.R. 10 C.P. 354 at p. 362.

³ *Ibid.*

⁴ *Ibid.*

⁵ See *Woodley v. Coventry* (1863), 2 H. & C. 164; *National Mercantile Bank v. Hampson* (1880), 5 Q.B.D. 177.

⁶ 18 & 19 Vict. c. 111. Text in Appendix I. *post*, p. 293.

by the Bankruptcy Act of 1883,¹ and statutory privileges and disabilities are enacted by the Bills of Sale Act 1878.² **Sect. 21.**

(g) Where, *e.g.*, a pawnbroker sells unredeemed pledges. The circumstances of such a sale imply an assertion by the pawnbroker that the goods have been pledged to him and that they are unredeemed, but his warranty goes no further.³ If, however, a seller conceals a defect of title, it will amount to a fraud on the buyer.⁴

(h) As in a sale under a poinding or other judicial process in Scotland.

COMMENTARY.

A breach of the maxim *nemo dat quod non habet* generally invalidates the title even of a *bond-fide* possessor. "The general rule of law," says Lord Herschell, "is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner even though full value be given."⁵ *Nemo dat quod non habet.*

Both in England and Scotland the owner of stolen goods may, as a rule, reclaim his property from an innocent holder, even if that holder be a *bond-fide* purchaser for value. In England, however, the rule is subject to the exception of market overt,⁶ and it also differs in some of its developments from the rule as applied to Scotland. *English and Scottish rules as to stolen goods.*

In Scotland an intermediate *bond-fide* purchaser is not liable to the true owner for the value of the goods by reason merely that they have passed through his hands. If the goods are recovered by the true owner from a *bond-fide* purchaser, the latter may have action for repayment of the price from an equally innocent seller, but such action would be founded on an implied undertaking as to title.⁷ No similar action could be maintained at the instance of the owner of the *Liability of intermediate purchaser.*

¹ 46 & 47 Vict. c. 52, Sect. 44. See *COM.*, Sect. 17 *ante*, p. 83.

² 41 & 42 Vict. c. 31, Sect. 4.

³ *Morley v. Attenborough* (1849), 3 Ex. 500.

⁴ Per Cur in *Morley v. Attenborough*, *supra*.

⁵ *London Joint Stock Bank v. Simmons* [1892], App. Cas. 201 at p. 215. See also *Mitchell v. Heys and Sons* (1894), 21 Ret. 600, per Lord Kinnear, at p. 610.

⁶ See Sects. 22 & 24 *post*.

⁷ See Sect. 12 (1).

Sect. 21.

goods, unless the party *dolo desit possidere*, or unless he had made a profit, and even then, only *in quantum lucratus*.¹ In England, on the other hand, the true owner who has failed to recover the goods, may claim their value from an innocent purchaser although he, in turn, has parted with them by sale or otherwise.² One exception exists to the last-mentioned rule. If the innocent purchaser has bought in market overt, and has re-sold before the offender is prosecuted to conviction, he will retain his privilege of market overt notwithstanding the Larceny Act 1861³ as amended by Sect. 24 of this Act.⁴

Illustrations of this section from the law of Scotland will be found in Appendix II. III. (3) *post*, p. 323.

Sect. 22.**MARKET
OVERT.**

22.—(1.) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2.) Nothing in this section shall affect the law relating to the sale of horses.

(3.) The provisions of this section do not apply to Scotland.

COMMENTARY.

Influence of
market overt
upon the law
of Scotland.

Market overt is confined to England and Ireland.⁵ The privilege, however, merits attention because of the reflex

¹ *Scott v. Low* (1704), Mor. 9123; *Walker v. Spence and Carfrae* (1765), Mor. 12802; *Faulds v. Townsend* (1861), 23 D. 437; M. P. Brown, p. 112; Bell's Com. i. 299; Bell's Prin., Sect. 527.

² Benjamin, p. 7, and cases there cited.

³ 24 & 25 Vict. c. 96, Sect. 100.

⁴ See Com., Sect. 24 *post*, p. 117.

⁵ The whole section was deleted by the select committee of the Commons, and the following substituted: "The buyer of goods in market overt shall not acquire any better or other title thereto than if the sale had taken place not in market overt." The original section was restored in committee of the whole House, apparently on the ground that so important a change in English law endangered the passing of the bill.

influence it exercises upon Scottish law. Thus in *Todd v. Armour*¹ (1882) a horse was bought at Falkirk Tryst from a person who, it was proved, had bought it at Armagh Fair, six days previously. The horse had been stolen from the pursuer, a farmer in Ireland, a few days before Armagh Fair, but the possessor maintained that, having been bought by his author in market overt in Ireland, and the thief not having been prosecuted to conviction, the *vitium reale* attaching to it had been purged. The Court held that the *onus* of proving that the special procedure in connection with the sale of horses necessary by the law of England and Ireland² had not been followed, lay on the pursuer and had not been discharged. The purchaser's title was therefore held good, a result which could not have been reached had the horse been stolen in Scotland and remained there. It does not appear what the effect would have been if the horse had been stolen in Scotland, taken over to Ireland, sold there in market overt, and afterwards brought back to Scotland.³

Sect. 22.
Todd v. Armour.

The relaxation of the English rule where the thief has been prosecuted to conviction is referred to in connection with Sect. 24, *Com. post*, p. 117.

Relaxation of
English rule.

In Scotland a few early decisions seem to have given special effect to sales in open market,⁴ but the rule of Scots law has been amply established by the cases noted in Appendix II. III. (3) *post*, p. 323.⁵

Law of
Scotland as to
sales in open
market.

¹ 9 Ret. 901.

² 2 & 3 Phil. & Mary, c. 7, and 31 Eliz. c. 12, the practical effect of which is to take horses out of the rule of market overt.

³ "I think our system of a *vitium reale*, which can never be removed, attaching to stolen property, is preferable to that obtaining in England and Ireland, of which indeed I consider this litigation a convincing illustration." —Per Lord Justice-Clerk Moncreiff, 9 Ret. at p. 906. For an explanation of the rules of market overt in England, see Benjamin on *Sale*, pp. 8 *et seq.*; Chitty on *Contracts*, 12th ed. p. 444; Smith's *Mercantile Law*, 10th ed. pp. 598 *et seq.*

⁴ *E.g. Gordon v. Menzies* (1887), Mor. 9122, where conditional effect was given to a sale in public market of a stolen article. But see the still earlier case of *Hay v. Elliot* (1689), Mor. 6219, where a sale of corn in open market was denied effect, although the corn had not been stolen, it being subject to landlords' hypothec. See also Ersk. ii. 6. 60, and *Dunlop and Co. v. E. Dalhousie* (1828), 6 Sh. 626, Affd. (1830), 4 W.S. 420.

⁵ See also Ersk. iii. 1. 10 and 5. 10, and passages from Stair cited by Lord M'Laren in his notes to Bell's *Com.* i. 305. Bell says: "As possession pre-

Sect. 23.**SALE UNDER
VOIDABLE
TITLE.**

23. When the seller of goods has a voidable title^(a) thereto, but his title has not been avoided^(b) at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith^(c) and without notice^(d) of the seller's defect of title.

NOTES.

(a) "*Voidable title.*" "Void" and "voidable" are not Scottish law terms, but they are convenient, and are now freely used in Scotland. "Void" corresponds to "*null ab initio*"; "voidable" to "reducible" or capable of being set aside by reduction or rescission.¹

(b) "*Avoided,*" i.e. reduced or rescinded.

(c) "*Good faith,*" explained Sect. 62 (2).

(d) "*Notice*" means *knowledge* on the part of the buyer irrespective of any formal intimation.²

COMMENTARY.

Effect of fraud,
etc., on
title.

This section forms a modification of Sect. 21. Invalidating causes such as fraud, mistake,³ etc., do not of themselves render a contract void or prevent a legal transfer to a *bona-fide* third party. It is true that an owner of goods who has been defrauded or misled may in Scotland raise action for reduction of the contract, and in England sue in trover for

sumes property in moveables, the general rule is that the purchaser of moveables at market or otherwise, in *bona fide*, acquires the right to them, although they may have been sold by one who is not the owner" (Bell's *Com.* i. 305). A passage from Stair is quoted as authority for this statement (Stair, iv. 40. 21), but, as pointed out by the learned editor of Bell's *Commentaries*, Stair is only dealing with a title obtained by *fraud*, and neither he nor Erskine gives the slightest countenance to the doctrine as applied to stolen goods. See further as to stolen goods and the effect of sales in public market—Bell's *Prin.*, Sects. 527, 1320; Bell's *Com.* i. 307, and M'Laren's notes; Bell on *Sale*, p. 80; M. P. Brown on *Sale*, pp. 112 and 417 *et seq.*; and *Com.*, Sect. 21 *ante*, p. 111.

¹ "An agreement or other act which is *void* has from the beginning no legal effect at all, save in so far as any party to it incurs penal consequences. . . . A *voidable* act, on the contrary, takes its full and proper legal effect, unless and until it is disputed and set aside by some person entitled so to do." —Pollock on *Contract*, 6th ed. p. 8.

² See Note (i), Sect. 25 *post*, p. 121.

³ The common-law effect of these is reserved by Sect. 61 (2).

the goods,¹ and that in either country he may, without a judgment or decree of Court, repudiate and rescind the transaction,² but unless some such step is taken before a sub-sale to an innocent person³ the sub-buyer acquires a good title.⁴ In other words, if before actual reduction or duly intimated rescission, the holder has sold to a *bond-fide* third party, the sale is good.⁵ Sect. 23.

But although the title may suffice to give a valid derivative right, notwithstanding it is in itself voidable, no such effect will flow from mere possession without title, or on some title short of ownership. "We must distinguish whether the facts show a *sale* to the party guilty of the fraud or a mere delivery of the goods into his possession induced by fraudulent devices on his part. . . . In the former case there is a contract of sale, however fraudulent the device, and the property passes; but not in the latter case."⁶ The *bond-fide* purchaser will not be protected if the person from whom he buys has merely a "special property"⁷ in the goods, such as that of a carrier or lessee.⁸

There must be a title though voidable.

The fact that in Scotland the property in goods sold may now pass to the buyer before delivery, extends the range of cases in which the title, though voidable, is not void. A person may validly sell goods, the property in which has passed to him, though they still remain in the original seller's custody, and although the original contract of sale is subject to reduction.⁹ On the other hand, no title

Seller's title in Scotland extended.

¹ Benjamin, p. 412.

² *Ibid.* p. 422.

³ "The rescission takes date from the time at which the deceived party announces to the opposite party his election to reject the contract."—Benjamin, p. 422.

⁴ "The fraud only gives a right to rescind. In the first instance the property passes in the subject-matter. An innocent purchaser from the fraudulent possessor may acquire an indisputable title to it, though it is voidable between the original parties."—Per Parke, B., in *Stevenson v. Newnham* (1853), 13 C.B. 285 at p. 302. See also *Pease v. Gloaghe* (1866), L.R. 1 P.C. 220; *Oakes v. Turquand* (1867), L.R. 2 H.L. 325.

⁵ "Where the sale has been induced by fraud, the seller is to be considered as having given his consent, but in consequence of the deceit that consent is held to be revocable to the effect of grounding an action for reduction and restitution, which, though not available against purchasers *bond fide*, is good against the buyer and his general creditors."—Bell's *Com.* i. 261. See also M. P. Brown on *Sale*, pp. 396, 416.

⁶ Benjamin, p. 412.

⁷ See *ante*, p. 5.

⁸ See note on this subject by M'Laren, Bell's *Com.* i. 261.

⁹ The rights given by this section and those flowing from Sect. 25 (2) re-

Sect. 23.

Effect of suspensive condition upon title.

is acquired even after delivery, if there is a condition of the sale suspending the passing of the property. This was the ground of judgment in such cases as *Murdoch and Co. Ltd. v. Greig*¹ (1889), but all these are now subject to Sect. 25 (2) of this Act, and to the provisions of the Factors Act 1889.²

Effect of bankruptcy upon seller's title.

A purchaser in good faith and for value is not affected by the seller's constructive fraud under the bankruptcy Acts, so long as the insolvent seller is not divested of his estates by sequestration,³ and even after sequestration, a *bona-fide* purchaser in possession is not obliged to restore, if he acted in ignorance of the sequestration, and has paid or is ready to pay the price.⁴

Sect. 24.

REVESTING OF PROPERTY IN STOLEN GOODS ON CONVICTION OF OFFENDER.

24.—(1.) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

(2.) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person

semble each other, but in the latter case there must have been delivery, while under the present section the property may have passed under a voidable title so as to validate a second sale, although the first buyer never obtained possession.

¹ 3 Ret. 396. *Brown v. Marr, Barclay, etc.* (1880), 7 Ret. 427, was an exception, but it was practically overruled by *Macdonald v. Western* (1888), 15 Ret. 988.

² 52 & 53 Vict. c. 45, Sect. 2. Sect. 9 of the Factors Act is practically the same as Sect. 25 (2) of this Act. The Factors Act was extended to Scotland by the Factors (Scotland) Act 1890 (53 & 54 Vict. c. 40). See text of Acts, Appendix I. *post*, pp. 296, 302.

³ Bankton, i. 10. 78; Bell's *Com.* ii. 179. Goudy on *Bankruptcy*, p. 48.

⁴ Bankruptcy Act 1856 (19 & 20 Vict. c. 79), Sect. 111.

who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender. Sect. 24.

(3.) The provisions of this section do not apply to Scotland.

COMMENTARY.

These provisions are supplementary to Sect. 22 relating to market overt. The special privilege which in England and Ireland pertains to market overt is restricted by the rule of the first sub-section, which even in its statutory form is as old as 21 Hen. VIII. c. 11 (1529).¹ But the exception to the privilege does not go the length of subjecting an innocent purchaser to the full responsibility of the English common-law rule as to stolen property. If he has bought in market overt, and has in turn parted with the goods before the offender is prosecuted to conviction, he will not be liable to the true owner. The property *reverts* in the owner in the event mentioned, but in the meantime it had vested in the innocent purchaser. The owner had been divested and had no right of property in the goods between the date of the purchase in market overt and the conviction of the offender. In the circumstances supposed, the result is the same as under the Scottish common-law rule to which reference has been already made.² In Scotland the true owner is never divested, yet he has no claim against an intermediate *bond-fide* holder. His

Sub-sect. (1).
Restriction
upon the
privilege of
market overt.

Compared
with Scots
law.

¹ The object seems to be to furnish an incentive to the private prosecution of criminals in the absence, or the imperfect operation, of public prosecution. An owner whose goods have been stolen, and who has spent time and money in endeavours to recover them, cannot be expected to add to his loss and to subject himself to trouble and risk by voluntarily undertaking the prosecution of the thief. But to induce him to do so the law promises that in the event of success he may recover his property even from an innocent purchaser in market overt. In Scotland, where there is no privilege of market overt, the true owner can recover unconditionally. The system of public prosecution is so complete that it is unnecessary to impose any duty of prosecution upon private individuals, and criminal prosecutions by private persons are practically unknown.

² *Ante*, p. 111.

Sect. 24.

only claim is against the goods themselves, which are subject to a *vitium reale* and can be revindicated wherever met with.

Sub-sect. (2).
Amendment of
Larceny Act.

The object of the second sub-section was to correct the Larceny Act¹ (1861) in so far as it extended the process of revesting to cases where the owner was not divested by market overt, but had parted with the goods in virtue of some title, not void, but only voidable. The term "larceny" was wide enough to cover those cases which, but for market overt, would have left the owner undivested, but the Larceny Act extended the effect of larceny to other offences, such as fraud and extortion, which at common law did not infer nullity of title, and which therefore gave no right to the former owner to recover the goods from a *bona-fide* holder for value.² It follows that if the former owner was divested by other means than market overt, he should not have been revested by a process which was intended to form an *exception* to market overt.

Bentley v. Vil-
mont.

This effect of the Larceny Act was brought out in *Bentley v. Vilmont*³ (1887), where an innocent purchaser bought goods in market overt without notice of any irregularity, but when the sellers to him were prosecuted to conviction for having induced the owner by fraud to part with the goods under a voluntary contract of sale, he was compelled to make restitution. In delivering judgment in the House of Lords Lord Watson said: "I have great difficulty in supposing that the Legislature, as an incentive to the prosecution of crime, deliberately intended in the case where the *property had been passed* by the act of the original owner, to deprive the honest purchaser both of his goods and of his money; but I have been unable to put a reasonable

¹ 24 & 25 Vict. c. 96, Sect. 100, re-enacting and adding to 7 & 8 Geo. IV. c. 29, Sect. 57.

² The words of the Larceny Act (Sect. 100) are, "If any person guilty of any such felony or misdemeanour as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on behalf of the owner of the property or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative."

³ 12 App. Ca. 471.

construction upon the language of Sect. 100, which will avoid that inequitable result.¹ **Sect. 24.**

The section does not apply to Scotland, there being no privilege of market overt in Scots law.² **Sub-sect. (3). Scotland excluded.**

25.—(1.) Where a person having sold goods continues or is ^(a) in possession of the goods, or of the documents of title to the goods,^(b) the delivery or transfer ^(c) by that person, or by a mercantile agent ^(d) acting for him, of the goods or documents of title ^(e) under any sale,^(f) pledge,^(g) or other disposition ^(h) thereof, to any person receiving the same in good faith ⁽ⁱ⁾ and without notice ^(j) of the previous sale, shall have the same effect as if the person making the delivery or transfer ^(k) were expressly authorised by the owner of the goods to make the same. **Sect. 25.**

**SELLER OR
BUYER IN
POSSESSION
AFTER SALE.**

(2.) Where a person having bought or agreed to buy ^(l) goods obtains, with the consent of the seller, possession ^(m) of the goods or the documents of title ⁽ⁿ⁾ to the goods, the delivery or transfer ^(o) by that person, or by a mercantile agent ^(p) acting for him, of the goods or documents of title,^(q) under any sale,^(r) pledge,^(s) or other disposition ^(t) thereof, to any person receiving the same in good faith ^(u) and without notice ^(v) of any lien or other right ^(w) of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or trans-

¹ 12 App. Ca. at p. 477. Doubt has been thrown upon the efficacy of the present section to carry out its manifest intention (*Law Times*, 12th May 1894), but it was held sufficient in *Goldman v. Koenig* before the County of London Quarter Sessions, 9th August 1894, and see *Payne v. Wilson*, 21st January 1895, Q.B.D. 11 Times Law Rep. 179.

² See Com., Sect. 22 *ante*, p. 111.

Sect. 25.

fer^(c) were a mercantile agent^(d) in possession of the goods or documents of title with the consent of the owner.

(3.) In this section the term "mercantile agent"^(d) has the same meaning as in the Factors Acts.^(e)

NOTES.

(a) "*Continues or is.*" The alternative suggested by these words may refer to goods appropriated to the contract after its date, or to goods sold while in the hands of a third party, and subsequently taken possession of by the seller.

(b) "'Document of title to goods' has the same meaning as it has in the Factors Acts." Sect. 62 (1).

(c) "*Delivery or transfer.*" Delivery is defined Sect. 62 (1). The section makes delivery or transfer of the goods or documents of title essential, and therefore the transaction must be executed, not merely executory. In this respect the provision differs from the similar enactment in the now repealed Factors Act of 1877.¹

(d) "*Mercantile agent.*" The use in this section of the term "mercantile agent" creates a difficulty. Sects. 8 & 9 of the Factors Act 1889² (which are reproduced almost *verbatim* in the present section) are quite distinct from the other sections of the Factors Act, and contemplate a transaction with a principal³ as well as with an agent. The express mention here of a *mercantile agent* suggests that a principal cannot employ an ordinary agent to do what he can validly do himself, and that the act of such an agent will not carry the same consequences as the act of a principal.⁴ This is contrary to the maxim *qui facit per alium facit per se*, and it is difficult to see any good reason for the restriction.

(e) "*Sale.*" Defined Sect. 62 (1). See also Sect. 1. The effect of a sale under this section differs from that under Sect. 48 (2). See note (d), Sect. 48 *post*, p. 230.

¹ 40 & 41 Vict. c. 39, Sect. 3. See judgment of North, J., in *Nicholson v. Harper* [1895], 11 Times Law Rep. 435.

² As in *Lee v. Butler* [1893], 2 Q.B. 318; *Helby v. Matthews* [1894], 2 Q.B. 262, Rev. H.L. [1895], 11 Times Law Rep. 446; *Payne v. Wilson* [1895], Q.B. Div. 11 Times Law Rep. 179.

⁴ See *Hastings, Ltd. v. Pearson* [1898], 1 Q.B. 62, but this judgment was under Sects. 1 & 2 of the Factors Act, not under Sects. 8 & 9.

(f) "*Pledge*" is excluded from the general scope of the Act [Sect. 61 (4)], but this section and Sect. 47 are exceptions. See Sect. 25. Com. *infra*, p. 276.

(g) "*Other disposition*." The Factors Act 1889 differed from the previous Factors Acts which it consolidated and amended by permitting a "mercantile agent" in possession to *barter* for other goods or documents.¹ This Act does not apply expressly to exchange or barter,² but the phrase "other disposition" is wide enough to cover such a disposal of the goods. The words "other disposition" also occur in Sect. 9 of the Factors Act 1889, and have been recently held to include a delivery of goods to an auctioneer for the purpose of sale.³

(h) "*Good faith*." Explained Sect. 62 (2).

(i) "*Notice*" means knowledge, however acquired, and is not confined to express notice.⁴

(j) "*Bought or agreed to buy*." The words "agreed to buy" refer to an executory sale in which no property has passed to the buyer,⁵ although he may have obtained possession with the seller's consent. The provision will cover a case of hire-purchase. The first sub-section does not employ a similar phrase in relation to the seller. The words are not "sold or *agreed to sell*," but simply "sold," the reason being that no difficulty can arise with third parties in regard to goods still possessed by the seller, where no property in them has passed to the buyer.

(k) "*Possession*." This Act does not define "possession," but a definition is given in the Factors Act 1889, Sect. 1 (2).

(l) "*Goods or documents of title*." The Factors Acts previous to that of 1889 did not refer to the goods themselves, but only to the documents of title representing the goods.

(m) "*Transfer of documents of title*." See Sect. 47, which validates a transfer for valuable consideration to a *bond-fide* sub-buyer or pledgee, as against the seller's lien or right of stoppage *in transitu*. In the case of pledge, Sect. 47 does not take away the seller's lien or right of stoppage *in transitu*, except in so far as such lien or stoppage conflicts with the rights of the pledgee. In other words, the seller is entitled to any surplus after satisfying the pledge. The same result was no doubt intended by the present section. The Factors Act 1889, from which it is copied, provides by another section,⁶ not expressly incorporated with this

¹ 52 & 53 Vict. c. 45, Sect. 5.

² See Com., Sect. 8 *ante*, p. 39.

³ *Shenstone v. Hilton* [1894], 2 Q.B. 452.

⁴ See *May v. Chapman* (1847), 16 M. & W. 355, per Parke, B., at p. 361; *E. of Sheffield v. London Joint Stock Bank* (1888), 18 App. Ca. 333, per Lord Bramwell at p. 346.

⁵ See Sect. 1.

⁶ 52 & 53 Vict. c. 45, Sect. 12 (2).

Sect. 25.

Act, that the owner can redeem pledged goods and recover any balance of money; but even if this provision is not to be read into the present Act, it is submitted that the same effect will follow at common law. The seller still possesses a right of ownership or "lien or other right," except so far as such right is taken away by the section, and in virtue of such right he is entitled to redeem the pledge, or to recover the surplus produce of a sale.

(n) "*Lien or other right.*" The sub-section is based upon the buyer's *possession* of the goods or documents of title. If the buyer has the *goods* the seller's right of lien is gone, but if the seller has merely transferred the *documents of title* the lien still exists, subject to the provisions of this sub-section and of Sect. 47. The "other right" here referred to cannot, in the case of the goods themselves, be stoppage *in transitu*, because the buyer's possession involves the termination of the transit, but (as in the case of lien) it may refer to stoppage *in transitu* in connection with the documents of title. Or the "other right" may refer to the seller's continued ownership where the property has not passed, or to some special contract under which the seller is to resume possession. Probably it would also cover the case of a buyer's title voidable at the instance of the seller, but this case is specially provided for under Sect. 23. Lien in Scotland is defined to include right of retention [Sect. 62 (1)], but see *COM.*, Sect. 39 *post*, p. 186.

(o) "'*Factors Acts*' mean the Factors Act 1889,¹ the Factors (Scotland) Act 1890,² and any enactment amending or substituted for the same" [Sect. 62 (1)]. The text of the Acts will be found in Appendix I. *post*, pp. 296, 302.

COMMENTARY.

Reproduction
of sections of
Factors Act.

The first sub-section reproduces Sect. 8 of the Factors Act 1889,³ but omitting the words "or under any *agreement* for sale, pledge, or other disposition thereof." The second sub-section reproduces Sect. 9 of the same Act with a similar omission. The sections of the Factors Act are not repealed, but it is suggested by the draftsman of this Act that they may be repealed by a Statute Law Revision Act.⁴

¹ 52 & 53 Vict. c. 45.

³ 52 & 53 Vict. c. 45.

² 53 & 54 Vict. c. 40.

⁴ Chalmers on *Sale of Goods Act*, p. 55.

In reference to the suggested repeal it is to be observed that a contract of sale includes an *agreement* to transfer as well as an actual transfer [Sect. 1], but there is no similar provision regarding "pledge or other disposition." The general provisions of this Act do not apply to pledge [Sect. 61 (4)] nor to any disposition other than that of sale.¹ On the other hand, a valid pledge cannot be constituted without actual possession of the goods or documents of title,² so that an *agreement* to pledge would be of no value.

Sect. 25.

Suggested repeal of reproduced sections. Effect on contract of pledge.

Sect. 4 of the Factors Act, providing that a pledge for an antecedent debt gives no further right than that of the pledgor, is not incorporated with this Act, but the provision is absolute in its terms, and seems to control this section without special incorporation.³

Pledge for antecedent debt.

The sections here reproduced first appeared in the Factors Act of 1877.⁴ Sect. 4 of that Act remedied a singular anomaly resulting from the previous Acts which is thus described by Benjamin. "If a merchant buying goods and paying the price received a transfer of the dock warrant, he would be safe if his vendor was *not owner* but only agent of the assignor of the warrant, and would not be safe if the vendor *was owner*, because the price might remain unpaid to the assignor of the warrant. . . . The original owner was held by the [older] statute to have abandoned his *actual possession* by giving the document of title to his agent, although he retained *ownership and right of possession*; he was held by the Courts to have retained his *actual possession* when he gave the document to a pur-

Anomaly under older Factors Acts now corrected.

¹ The law of pledge in England and Scotland does not always run on the same lines. Thus in England, mere custody of deeds or documents representing real or personal estate, implies the custody of the property itself and constitutes an effectual pledge. In Scotland there is no vesting by mere custody of writs without formal disposition or completed assignation. In illustration of the English law of equitable mortgage or pledge, see *Brocklesby v. The Temperance Permanent Building Society and Others* (1895), H.L. 11 Times Law Rep. 297.

² See *North-Western Bank, Ltd. v. Poynter, Son, and Macdonalds* (1894), 12 Ret. 513, Rev. H.L. 32 S.L.R. 245.

³ A similar provision in the now repealed Factors Act of 1842 (5 & 6 Vict. c. 39, Sect. 3) was founded on and sustained in *Martinez y Gomez v. Allison* (1890), 17 Ret. 332.

⁴ 40 & 41 Vict. c. 39, Sects. 3 & 4.

Sect. 25.

chaser, although he had abandoned *both ownership and right of possession.*"¹

Goods themselves may now be dealt with.

The Factors Act 1889 differed from the Acts which it amended and consolidated by including dealings with the goods themselves as well as with the documents of title to goods,² hence its effect upon the contract of hire-purchase to which reference is made in connection with Sect. 17.³

Sale must now be executed.

It also differed from the Factors Act of 1877 by introducing into what have been called the "sale sections"⁴ the words "delivery or transfer," which confined the operation of the sections to "*executed*" contracts of sale.⁵

Statutory reputed ownership in seller and buyer.

The effect of the first sub-section is to create a statutory reputed ownership in the seller where he retains possession but the property has passed to the buyer. In like manner the second sub-section creates a statutory reputed ownership in the buyer where, notwithstanding delivery, the passing of the property to him is suspended. The latter sub-section affects conditions suspensive of the passing of the property, *e.g.* hire-purchase,⁶ at least in all cases where the buyer or hirer does not reserve an absolute right to return the goods on payment only of the arrears of instalments due.⁷

Does not extend to creditors.

The reputed ownership here enacted only benefits individuals transacting with the seller or buyer on the faith of their possession; it cannot be founded on by the general creditors of the party holding the goods. As suggested in an earlier part of this work,⁸ it is for consideration whether, in view of the change introduced by this Act in the mode of passing the property, some provision similar to the English statutory reputed ownership should not be introduced into Scotland.

¹ Benjamin, p. 831.

² Compare with the present section the repealed Factors Act of 1877 (40 & 41 Vict. c. 39), Sects. 3 & 4.

³ *Ante*, p. 83.

⁴ Sects. 8 & 9 of Factors Act 1889. Compare with Sects. 3 & 4 of Act of 1877.

⁵ See note (c), *supra*.

⁶ *Lee v. Butler* [1893], 2 Q.B. 318; *Strohmenger v. Attenborough* [1894], 11 Times Law Rep. 7; *Payne v. Wilson* [1895], 11 Times Law Rep. 179. See Com., Sect. 17 *ante*, p. 83.

⁷ *Helby v. Matthews and Others* [1895], H.L. 11 Times Law Rep. 446.

⁸ Com., Sect. 17 *ante*, p. 83.

The definition of "document of title," imported from the Factors Act, has greatly widened the effect given by the common law to delivery orders and other similar documents. The question whether they are transferable by simple indorsation, and whether the goods themselves also pass by this means, is set at rest by the express provision that "'document of title' shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as *proof of the possession or control* of goods, or authorising or purporting to authorise *either by endorsement or by delivery* the possessor of the document to transfer or receive goods thereby represented."¹ The history of this question exhibits great reluctance on the parts of the Courts both of England and Scotland to recognise delivery orders as passing the property by mere indorsation. In Scotland intimation to the custodier has been deemed necessary, and in England an acknowledgment by the custodier that he holds for the transferee has also been required.² The progress of legislation on the subject suggests an undercurrent of conflict between the legislature and an unwilling judicatory, resembling the historical contest regarding promissory notes, which ended in legislative sanction being given to these documents as negotiable instruments.³

Sect. 25.

Effect of delivery orders as documents of title.

Development of the law.

¹ The definition above quoted is precisely the same as that in the repealed Factors Act of 1842 (5 & 6 Vict. c. 39, Sect. 4), except that the word "*and*" is added, so that "warehouse-keeper's certificate warrant or order" now reads "warehouse-keeper's certificate *and* warrant or order." The difference is important, the former wording being so understood as to limit the delivery order intended by the Act to that of a warehouse-keeper, and to exclude delivery orders by purchasers or other owners of goods. Correct Chalmers's note on this subject (*Sale of Goods Act*, p. 121) by substituting "wharfinger's certificate" for "warehouse-keeper's certificate." The case of *Gunn v. Bolckow, Vaughan, and Co.*, 1875, 10 Ch. App. 491, was special, and is scarcely an authority for Chalmers's statement that "the Lords Justices held that these documents" (warehouse-keeper's certificates) "were not documents of title." See Blackburn, p. 421.

² See Sect. 29 (3), but "documents to title" are excepted from the operation of the section. Scottish cases on the subject will be found in Appendix II. iv. (1) *post*, p. 831.

³ The reporter of *Clarke v. Martin* (1702), 2 Lord Raymond 758, says:—"Holt, C. J., was with all his strength against this action [on a promissory note], and said that this note could not be a bill of exchange; that the main-

Sect. 25.

Privileges
of bills of
lading.

Dock warrants,
etc.

Common-law
effect of
warrants and
certificates
still limited.

Bills of lading were privileged as documents of title at a much earlier period than any of the other documents mentioned in the definition,¹ probably because of the inconvenience of being unable otherwise to deal with goods during a long period of transit and voyage.² Dock warrants and warehouse-keeper's certificates come next in the order of recognition, these being granted by or on behalf of the person having the custody of the goods. Finally, by the present definition the privilege is extended to delivery orders granted by the owner of the goods whether he is the custodier or not.³ But apart from the Factors Acts and the definition of "document of title" incorporated with this Act, it may be doubted if the indorsement of a dock warrant, or a warehouse-keeper's certificate, or a delivery order, has as yet received any effect beyond that of a token of an "authority to receive possession."⁴ They are certainly not "negotiable instruments" in the sense which the common law attached to that phrase in connection with bills of exchange and promissory notes. Even bills of lading have

taining of these actions upon such notes were innovations upon the rules of common law, and that it amounted to setting up a new sort of specialty unknown to the common law and invented in Lombard Street, which attempted in these matters of bills of exchange to give laws to Westminster Hall; that the continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness, since he had always expressed his opinion against them." Similar strong language was used by the Chief Justice in the subsequent case of *Buller v. Cripe* (1703), 6 Mod. Rep. 29, but the London merchants had the ear of the legislature, and, in this case, the Court was saved the trouble of coming to a final judgment by the Act of 1704 (3 & 4 Anne c. 9).

¹ See Scottish cases in Appendix II. iv. (1) *post*, p. 331.

² *Lickbarrow v. Mason* (1793), 6 East 21; and see *COM.*, Sect. 19 *ante*, p. 101. The preamble of the Bills of Lading Act 1855 (18 & 19 Vict. c. 111) recites that "by the custom of merchants a bill of lading of goods being transferable by endorsement the property in the goods may thereby pass to the endorsee."

³ The distinction between a warrant for goods (including a warehouse-keeper's certificate) and a delivery order is illustrated by the provisions of the Stamp Act 1891 (54 & 55 Vict. c. 39). Compare Sect. 111 (warrant) with Sect. 69 (delivery order). The stamp upon the former is 3d., upon the latter 1d. "Endorsement does not render a delivery order liable to further duty, nor does a warrant for goods become chargeable a second time as a delivery order by reason of its being endorsed by the original owner of the goods to another person."—Griffith's *Digest of Stamp Duties*, 11th ed. p. 66.

⁴ See Blackburn on *Sale*, pp. 415, 418—*M'Erwen and Co. v. Smith* (1849), 6 Bell's App. Ca. 340.

not this effect, for the validity of a transfer depends on the sufficiency of the granter's title to the goods in question, whereas bills and notes, being monetary instruments, import an unlimited personal obligation on the part of the granters and indorsers. In this view, the definition of "document of title" given by the Factors Act 1889 will not affect constructive delivery, or defeat the seller's remedies in a question with the buyer or his creditors. **Sect. 25.**

26.—(1.) A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month, and year when he received the same. **Sect. 26.**

EFFECT OF
WRITS OF
EXECUTION.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2.) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

(3.) The provisions of this section do not apply to Scotland.

Sect. 26.

COMMENTARY.

Law of
England and
Ireland con-
trasted with
Scotland.

The main enactment is a reproduction of Sect. 15 (commonly called Sect. 16) of the Statute of Frauds.¹ The proviso is a re-enactment of Sect. 1 of the English Mercantile Law Amendment Act of 1856.² Both sections are repealed by this Act.³

The Mercantile Law Commission of 1855, after comparing the law of England and Ireland regarding execution and seizure of goods for debt with that of Scotland, recommended that the laws of the United Kingdom should be assimilated on the lines of the law of Scotland.⁴ This proposal, however, did not receive statutory sanction, and the only result was the provision here reproduced from the Mercantile Law Amendment Act of 1856. The Scottish rule was not touched by the corresponding Mercantile Law Amendment Act passed for Scotland.⁵

¹ 29 Car. II. c. 3.

² 19 & 20 Vict. c. 97.

³ Sect. 60 and Schedule.

⁴ The law of England and Ireland and that of Scotland are thus contrasted by the Commissioners. "In England and Ireland it is held that the execution creditor of the seller is preferable to the buyer, although the sale take place before the actual seizure of the goods under the writ if, before the sale, the writ has been placed in the hands of the sheriff. This is unfair to the buyer, as until the seizure take place there is nothing to warn him that the owner of the goods has been deprived of his right to sell them; and indeed the owner himself may often be in ignorance of this. In Scotland . . . the warrant for execution has no such effect by being merely placed in the hands of the officer who is to execute it, or until he actually proceeds to carry the execution into effect; and if during the intermediate period there be a *bond-fide* sale of the goods, and the possession of them be obtained by the buyer, they cannot thereafter be attached by a creditor of the seller."—Report, p. 8.

⁵ 19 & 20 Vict. c. 60.

PART III.

PERFORMANCE OF THE CONTRACT.

27. It is the duty of the seller to deliver^(a) the goods, and of the buyer to accept and pay^(b) for them, in accordance with the terms of the contract of sale.^(c)

Sect. 27.
DUTIES OF
SELLER AND
BUYER.

NOTES.

(a) "'Delivery' means the voluntary transfer of possession from one person to another" [Sect. 62 (1)]. The rules as to delivery are contained in Sect. 29.¹ "Of every specific article bought, delivery may be legally enforced from the seller, and he cannot by disregarding his obligation to deliver at the particular time stipulated, retain the subject and convert the purchaser's claim into one for damages."² In certain circumstances, however, the seller will be allowed a reasonable time within which to perform his obligation.³ If actual delivery is not contemplated, the contract may be one for differences only, and therefore a wager not enforceable at law.⁴

(b) "To accept and pay." Acceptance is defined by Sect. 35. Such acceptance differs from that under Sect. 4 (formerly Statute of Frauds), as to which see note (b) *ante*, p. 25. As acceptance is the counterpart of delivery, it is equally

¹ As to the form of delivery and equivalents for actual transfer, see COM., Sect. 23 *post*, p. 132 *et seq.*

² Per Lord Cowan in *Sutherland v. Montrose Shipbuilding Co.* (1860), 22 D. 665 at p. 671. See *Graham and Co. v. Pollock and Caldwell* (1763), Mor. 14198; *Maclelland v. Adam and Mathie* (1795), Mor. 14247; Bell's *Prin.*, Sect. 113; Benjamin, pp. 676, 677.

³ *Forbes v. Campbell* (1885), 12 Ret. 1265. As to proof of delivery, see *Dunbar v. Harvie* (1820), H.L. 2 Bligh 351.

⁴ *Heiman v. Hardie and Co.* (1885), 12 Ret. 406.

Sect. 27.

subject to any special conditions of the contract, such as notice to be given by the seller of the place where delivery is to be given, or notice by the buyer of the place where the goods are to be accepted.¹ If, however, the contract fixes a place of delivery in the interest of the seller alone, the buyer may be bound to accept them at another place named by the seller.² The time of payment may be fixed with reference to the *arrival* of the goods, and in such case, if the buyer's obligation to pay subsists notwithstanding the loss of the goods during transit, he must pay within a reasonable time after they *should* have arrived in ordinary course, or after arrival has been ascertained to be impossible.³ "The chief obligation of the buyer is to pay the price according to the terms express or implied. . . . The next obligation is to take delivery of the goods if they be in the condition stipulated or implied at the time when the seller is bound to deliver."⁴

(c) The terms of the contract apply equally to delivery, acceptance, and payment.

Sect. 28.

PAYMENT AND
DELIVERY ARE
CONCURRENT
CONDITIONS.

28. Unless otherwise agreed,^(a) delivery^(b) of the goods and payment of the price^(c) are concurrent conditions,^(d) that is to say, the seller must be ready and willing^(e) to give possession^(f) of the goods to the buyer in exchange for the price, and the buyer must be ready and willing^(g) to pay the price^(h) in exchange for possession of the goods.

NOTES.

(a) "*Unless otherwise agreed.*" *E.g.* the goods may be sold on credit, or the contract may provide a special time for delivery

¹ *Davies v. MacLean* (1873), 21 W.R. 264.

² *Neill v. Whitworth* (1865), L.R. 1 C.P. 684.

³ *Fragano v. Long* (1825), 4 B. & C. 219, per Bayley, J., at p. 222; *Alexander v. Gardner* (1835), 1 Bing. N.C. 671.

⁴ Bell's *Prin.*, Sects. 127, 128. See also Bell on *Sale*, pp. 79, 103; M. P. Brown, pp. 199, 343; Benjamin, p. 708; *Drew v. Ogilvie, Heggie, and Co.* (1833), 11 Sh. 342. A party was held not *in mora* in taking delivery of a ship under a charter-party, in *Carswell v. Collard* (1893), 20 Ret. H.L. 47. The same principle applies to sale. On the other hand, a buyer of oats who had delayed taking delivery for a fortnight, during which time grain had greatly increased in value, was held not entitled to demand delivery—*Craig and Co. v. Hamilton* (1823), 2 Sh. 347 (N.E.) 305.

and a different time for payment. In such cases delivery and payment are not concurrent conditions.¹ **Sect. 28.**

(b) "*Delivery*." Defined Sect. 62 (1). As to form and equivalents, see COM. *infra*, p. 132 *et seq.*

(c) "*Price*." See Sects. 8 and 9, and COM. *ante*, p. 36. See also note (g) *infra*.

(d) "*Concurrent conditions*" are of the nature of mutual conditions precedent (suspensive). "Neither party can enforce the contract against the other without showing performance."²

(e) "*Ready and willing*." It is not necessary in the ordinary case for either seller or buyer to prove an actual tender.³ "Ready and willing" when used in pleadings means that the non-completion of the contract is not the fault of the plaintiff, and that he is disposed and able to complete it.⁴

(f) "*Possession*" is not defined in this Act, but see Factors Act 1889,⁵ Sect. 1 (2).

(g) "The seller is liable to deliver [the goods] whenever they are demanded upon payment of the price, but the buyer has no right to have possession of the goods till he pays the price."⁶

COMMENTARY.

Sale is an exchange of goods for a price: the seller parts with the goods but is entitled to the price, while the buyer pays the price but is entitled to the goods.⁷ In the normal contract the exchange should be simultaneous as expressed **Concurrent conditions.**

¹ *Dunlop v. Grole* (1845), 2 C. & K. 153; *Staunton v. Wood* (1851), 16 Q.B. 638.

² Benjamin, p. 580.

³ *Rawson v. Johnson* (1801), 1 East 203. Where sellers abroad sent the goods to their agents in London, and the agents repeatedly asked the buyers to send accepted bills, which was not done, the sellers were held entitled to sell the goods and to recover damages—*Jacques, Serruys, and Co. v. Watt* (12th February 1817), F.C.

⁴ *Cort v. Ambergate Railway Co.* (1851), 17 Q.B. 127, per Lord Campbell, C. J., at p. 144. As to the circumstances in which actual tender is required, see *Pickford v. Grand Junction Railway Co.* (1841), 8 M. & W. 372, per Parke, B., at p. 377.

⁵ 52 & 53 Vict. c. 45.

⁶ *Bloxam v. Sanders* (1825), 4 B. & C. 941, per Bayley, J., at p. 948.

⁷ "In a contract where nothing is said about the time for payment of the price, the law reads it as a ready-money bargain. A ready-money bargain means one in which the obligations of payment and of delivery are reciprocal. The seller cannot demand the price of the goods without offering the purchaser delivery, nor can the purchaser demand delivery without offering payment of the price."—Per Lord Justice-Clerk Inglis in *Hall and Sons v. Scott* (1860), 22 D. 413 at p. 420. Where the buyer has granted a bill for the price, the Court will not readily suspend on mere allegations of inferiority of quality—*Anderson v. Morris* (1854), 26 Sc. Jur. 459.

Sect. 28. in this section, but there may be modifying conditions either express or implied. Payment of the price before delivery is comparatively rare, but credit, or postponement of payment after delivery, is common, especially in mercantile transactions.

Sales on credit. The rights of parties are often seriously affected by the determination of the question whether credit, however short, was really intended. If in a sale for ready money the buyer, by error or fraud, receives the goods without making payment of the price, no property passes to him,¹ but if credit is once allowed, though obtained by misrepresentation or concealment, the goods are the property of the buyer, and may be validly transferred by him to a third party, or taken possession of by his general creditors. The distinction is well brought out in the case of *Richmond and Co. v. Railton*² (1854), where the transaction was originally for ready money, but, payment not being made on delivery, the sellers (as they alleged) were induced by fraudulent concealment of circumstances to accept of a bill at four months. The averment was held irrelevant. Contrasting the circumstances with those of *Watt v. Findlay*³ (1846) Lord Murray said: "If the sellers sold to be paid on delivery, they ought to have insisted on that condition being fulfilled. To entitle to restitution the delivery must be obtained by fraud, but if there be delay allowed as to payment and the other party get possession, then the possession is with the seller's allowance and approbation, and it is no longer a case of delivery on a ready-money price, but on credit."⁴

Delivery—actual or constructive. The delivery to the buyer in fulfilment of the contract may, according to circumstances, be actual or constructive. "Where goods are ponderous and incapable of being handed

¹ "If a tradesman sold goods to be paid for on delivery, and his servant by mistake delivers them without receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser." —Per Bailey, J., in *Bishop v. Shillito* (1819), 2 B. & Ald. 329, note; Bell's *Com.* i. 258; Benjamin, pp. 282, 304. See *Watt v. Findlay* (1846), 8 D. 529, as explained in *Richmond and Co. v. Railton* (1854), 16 D. 403.

² 16 D. 403.

³ 8 D. 529.

⁴ 16 D. at p. 409. Instances of delivery not passing the property by reason of constructive fraud will be found in Appendix II. III. (7). The theory is fully discussed by Brodie (*Com. on Stair*, pp. 853-857, note).

over from one to another there need not be an actual Sect. 28.
 delivery, but it may be done by that which is tantamount,
 such as the delivery of the key of the warehouse in which
 the goods are lodged, or by the delivery of other *indicia* of
 property."¹ So far as regards mere *indicia* or symbols of Real or
 property, this statement of Lord Kenyon possibly requires symbolical.
 qualification in applying it to the law of Scotland. The
 handing to the buyer the key of a warehouse in which the
 goods are stored is a competent form of delivery in Scot-
 land as well as in England, but this is *real*, not symbolical
 delivery. "It differs from symbolical delivery in this, that
 a symbol is properly nothing more than the sign of the
 thing transferred—the image by which it is represented to
 the senses; whereas the delivery of the key gives to the
 buyer access to the actual possession of the subject, and
 power over it, while the seller is excluded; in which parti-
 cular it corresponds with what Lord Stair delivers in his
 definition of actual possession—'having the goods in fast
 places, to which others have no easy access.'"² It is
 doubtful if delivery of moveables by mere symbol, though
 apparently competent in England,³ has any place in the law
 of Scotland. In a case as to growing corn such delivery
 was held effectual to exclude the creditors of the seller,⁴ but
 in the opinion of Bell the case decided nothing as to the
 transfer to the buyer.⁵ On the whole, it is tolerably cer-

Effect of sym-
 bols upon
 delivery.
 Doubt as to
 law of Scot-
 land.

¹ Per Lord Kenyon, C. J., in *Chaplin v. Rogers* (1800), 1 East 192. See also *dictum* of Lord Kenyon in *Ellis v. Hunt* (1789), 3 T.R. 464 at p. 468. In England an "equitable mortgage" may be created by the mere deposit of title-deeds or securities, while a similar deposit in Scotland has no effect without a written disposition or other formal and completed transfer of the property. The effect given in England to a fraudulent deposit of mortgages in a question with *bona-fide* lenders is illustrated by *Brooklesby v. The Temperance Permanent Building Society and Others* (1895), H.L. 11 Times Law Rep. 297.

² Bell's *Com.* i. 186. See also as to the effect of the delivery of the key of a warehouse or repository, Pollock and Wright on *Possession*, p. 80 *et seq.* Such delivery is, however, often called "symbolical," e.g. in *Meyerstein v. Barber* (1866), L.R. 2 C.P. 38, per Willes, J., at p. 52, and in Smith's *Mercantile Law*, 10th ed. p. 642.

³ *Manton v. Moore* (1796), 7 T.R. 67, and other cases cited in Smith's *Mercantile Law*, 10th ed. p. 642.

⁴ *Grant v. Smith* (1758), Mor. 9561, but see *Elder v. Allen* (1833), 11 Sh. 902.

⁵ Bell's *Com.* i. 187. Bell's argument, however, is founded on an erroneous view of transit and stoppage *in transitu*. See *Com.*, Sect. 44 *post*, p. 205.

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tain that the transfer of goods, however ponderous, by the mere passing of a symbol, is not recognised in Scotland.¹ It is difficult to formulate any sufficient reason for the exclusion, seeing that the question of delivery is one of intention, and that a symbol sometimes assists the proof. No doubt the symbolical delivery of heritage prior to 1845 was found cumbersome and unnecessary, but the reason was that the written record, which was in all cases necessary, was more effectual than any symbol, and that, in face of a written and registered contract, a symbol was an empty form. This reason does not apply to a consensual contract such as sale,² and possibly, now that the property may pass without delivery of any kind, the Courts in Scotland will be less exacting as to form, in cases where delivery is clearly intended. There seems no reason why in a trifling detail the laws of England and Scotland should differ, while they are assimilated in regard to the important principle of the passing of the property.

"Feigned"
delivery.

Bell, while excluding generally any kind of delivery in Scotland "in which there is not a manifest change of custody,"³ admits what he calls "feigned" delivery in certain special cases, which he illustrates thus: "If," he says, "I go into a goldsmith's shop and . . . find standing in the shop a vase begun, and purchase and pay for that specific vase, which I order him to proceed in finishing for me, the property of the vase will be transferred to me by the feigned tradition. . . . It would be absurd to carry away the materials or the vase by way of taking possession, when it

¹ *Ker v. Scot and Elliot* (1695), Mor. 9122; *Taylor v. Jack* (1821), 1 Sh. 183 (N.E.) 189. But see *Eadie v. Young* (1815), Hume 705, where the evident intention of parties was to deliver by means of a symbol and the delivery was held good. Bell refers to certain cases of "feigned" delivery not involving the element of symbol, and then continues—"In no other case does the law of Scotland seem to hold delivery sufficient for passing the property in which there is not a manifest change of custody"—Bell's *Com.* i. 189. This, however, is too strong a statement. See *Gibson v. Forbes* (1833), 11 Sh. 916, which, although sometimes doubted (e.g. Ross, *L. C., Com. Law*, ii. 567), seems a reasonable decision on the ground of clear intention and *bona fides*. See also cases in Appendix II. III. (4) *post*, p. 324.

² Of course symbolical delivery is to be distinguished from the delivery of arles or earnest. The latter is symbolical of the completion of a bargain, but does not import any delivery of the goods themselves.

³ Bell's *Com.* i. 189.

was to be instantly returned for manufacturing.”¹ Similar illustrations are given of an unfinished ship bought while on the stocks, a piece of cloth bought at a printfield, and a merchant seeking to fulfil a foreign order by buying the cloth in preparation upon the looms of several manufacturers.² Even this limited recognition of an equivalent for delivery in the cases mentioned, has been subjected to strong adverse criticism. One writer asserts that “the doctrine of Bell seems to contradict everything like settled principle in our law, and to be unsupported by a shadow of authority.”³ This is perhaps an extreme view, for though it is certainly very unusual to contract for the *immediate* purchase of an unfinished article which it is intended that the seller should complete and render fit for delivery, there is nothing to prevent such a contract, and there seems nothing in principle to prevent the “feigned” delivery of which Bell speaks. The difficulty seems to lie in the proof, which would require to be so clear as to stand the negative test that, when the article is finished, if it does not conform to the buyer’s instructions, he is not in a position to reject it. On the assumption referred to, the unfinished goods became the property of the buyer in their unfinished state, and, therefore, the buyer’s remedies under the new contract for finishing, are the same as if he had taken the goods to an independent tradesman, with instructions to expend labour and money upon them. On the other hand, there cannot be said to be any Scottish authority in favour of delivery in the circumstances mentioned by Bell, and in regard to the illustration of an unfinished ship on the stocks, it is doubtful how far the theory of specific appropriation has been sanctioned in Scotland.⁴

Sect. 23.

Criticism of
Bell’s doctrine.¹ Bell’s *Com.* i. 189.² *Ibid.* i. 187.

³ Brodie’s *Com. on Stair*, p. 905, note. “To bring about such a result it would be necessary to assume that the thing as it stands passes by an immediate sale, and that there is thus a separate contract by which the vendor is under an obligation to finish it in a different capacity . . . whereas there is but one indivisible contract. . . . Even after the article is completed the buyer is not bound to accept of it unless it, as a perfect article, corresponds with the description agreed upon.”—Brodie’s *Com. on Stair*, p. 898. It will be observed that Brodie assumes an indivisible contract, but the only ground for such an assumption is the improbability referred to in the text, of there being two separate contracts, and the difficulty of proof.

⁴ See Sect. 18, Rule 2, and *Com. ante*, p. 96.

Sect. 29.
RULES AS TO
DELIVERY.

29.—(1.) Whether it is for the buyer to take possession^(a) of the goods or for the seller^(b) to send them to the buyer^(b) is a question depending in each case on the contract, express or implied,^(c) between the parties. Apart from any such contract, express or implied, the place of delivery^(d) is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods,^(e) which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2.) Where under the contract of sale^(a) the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.^(f)

(3.) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person^(g) acknowledges to the buyer that he holds the goods on his behalf^(h); provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.⁽ⁱ⁾

(4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state^(j) must be borne by the seller.

NOTES.

Sect. 29.

(a) "*Possession*." Defined in Factors Act 1889, Sect. 1 (2). See Appendix I. *post*, p. 297.

(b) "*Seller*," "*buyer*." Defined Sect. 62 (1).

(c) "*Express or implied*." See Sect. 55. As to the interpretation of an express contract regarding delivery, see *Haig v. Napier*¹ (1813). An express contract as to time is often so worded as to involve questions of difficulty. The following words (among many others) have been legally interpreted: "directly,"² "forthwith,"³ "as required,"⁴ "as soon as possible."⁵ A list of such words will be found in Chalmers' *Sale of Goods Act*, Notes, p. 176.

(d) "*Delivery*," "*specific goods*." Defined Sect. 62 (1).

(e) "*Contract of sale*." See Sects. 1 and 62 (1).

(f) "A reasonable time is a question of fact." Sect. 56. See COM. *infra*, p. 261.

(g) Such as a carrier or warehouse-keeper.

(h) *Acknowledgment by third party*. This alters the law of Scotland. See COM., Sect. 18 *ante*, p. 92.

(i) "*Document of title to goods*" has the same meaning as it has in the Factors Acts [Sect. 62 (1)]. For text of the Factors Acts, see Appendix I. *post*, pp. 296, 302. The general effect of documents of title is referred to COM., Sect. 25 *ante*, p. 125.

(j) "*Deliverable state*." See Sect. 62 (4).

COMMENTARY.

The word "delivery" in this section is not used in the sense sometimes attributed to it, as where the property has passed and the seller holds as bailee or custodian for the buyer. In English law the seller may maintain an action against the buyer for the price of "goods sold and delivered," although the goods have never left the actual custody of the seller.⁶ This Act does not adopt the technical and

Meaning of
"delivery."

¹ 1 Dow 255.

² *Duncan v. Topham* (1849), 8 C.B. 225.

³ *Staunton v. Wood* (1851), 16 Q.B. 688; *Roberts v. Brett* (1865), 11 H.L. 337.

⁴ *Jones v. Gibbons* (1853), 8 Ex. 920.

⁵ *Hydraulic Engineering Co. v. M'Haffie* (1878), 4 Q.B.D. 670.

⁶ As to the different meanings of "delivery," see Benjamin, pp. 677 and 768.

Sect. 29. customary title of such an action, but merely calls it an "action for the price" [Sect. 49 (1)]. See note, Sect. 62 (1) *post*, p. 284.

Sub-sect. (1). *Sub-sect. (1).*—This sub-section was several times altered in committee. It deals with the mode and place of delivery, but, in regard to the mode, it lays down no rule apart from contract. The rule as to place is that of the German Commercial Code,¹ which, however, does not materially differ from that of other countries.² It is substantially the rule previously assumed as the law of England.³ But, previous to the Act, there does not appear to have been any definite rule in regard to goods which, in the knowledge of the parties, are in "some other place." This case is now regulated by the proviso attached to the sub-section.

Sub-sect. (2). *Sub-sect. (2).*—"Where no time is specified for the execution of a commission, a reasonable discretion is allowed."⁴ What is a reasonable time will depend on the circumstances.⁵ Thus in *Philips v. Blair and Martin*⁶ (1801) the House of Lords (reversing the Court of Session) held that where no time was fixed for delivery, three months was unreasonable, and in *Robb v. Cruikshank*⁷ (1840) ten days was deemed unreasonable in a cash transaction.⁸ On the other hand, in *Forbes v. Campbell*⁹ (1885) the purchaser of a vessel was not permitted to resile from the contract merely because the seller was unable to tender a valid title as executor of his father until a month had elapsed, and in *Taylor v. Maclellans*¹⁰ (1891) a contract

¹ Art. 342.

² Pothier, *Vente*, No. 52; French Civil Code, Art. 1609; Benjamin, p. 684; Kent's *Com.*, 12th ed. ii. 505; Indian Contract Act 1872, Sect. 94; Bell on *Sale*, p. 94; M. P. Brown on *Sale*, p. 209.

³ "In the absence of a contrary agreement, the seller is not bound to send or convey the goods to the buyer. He does all that he is bound to do by leaving or placing the goods at the buyer's disposal, so that the latter may remove them without lawful obstruction."—Benjamin, p. 682.

⁴ *Cooper v. Green and Chatto* (1791), Mor. 10100.

⁵ It is a question of fact and not of law (see Sect. 56).

⁶ 4 Pat. App. 256.

⁷ 2 D. 988.

⁸ "The word 'cash' is very important. It subjected the buyer to prompt and instant payment, and it implied that he was entitled to immediate delivery."—Per Lord Gillies, 2 D. at p. 992.

⁹ 12 Ret. 1065.

¹⁰ 19 Ret. 10.

to furnish ironwork as required for a building, was held not rescinded by delay resulting from strikes and other exceptional causes. The principles regulating such cases "are as old as the law of contract. When a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of universal application . . . and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as that delay is attributable to causes beyond his control."¹ The seller must also be reasonable in regard to the relative duties of the buyer. Thus, where under a contract, goods are to be delivered "as required," the seller cannot rescind because of the buyer's delay in requiring delivery, without first giving him reasonable notice.²

Sub-sect. (3).—The law of Scotland seems to have been satisfied with *intimation* to the custodier, without acknowledgment by him. The subject has been already referred to in another connection.³

Sub-sect. (4).—What is a reasonable hour was formerly matter of law;⁴ now it is a question of fact.

Sub-sect. (5).—"The vendor is bound at his own

¹ Per Lord Watson in *Hick v. Raymond and Reid* [1893], A.C. 22 at p. 32.

² *Jones v. Gibbons* (1853), 8 Ex. 920, per Pollock, C.B. at p. 922.

³ *COM.*, Sect. 18 *ante*, p. 92. "In the ordinary case where goods in the hands of a storekeeper are sold by the owner, and a delivery order is given by him to the buyer, the *intimation* of the delivery order by the buyer to the storekeeper operates constructive delivery, and from that moment constitutes the storekeeper custodier, or holder for the buyer, just as before, he was custodier or holder for the seller."—Per Lord President Inglis in *Black v. Incorporation of Bakers* (1867), 6 Macp. 136 at p. 141. "I have no doubt that the delivery order, with due notice to the custodier, is good constructive delivery."—Per Lord Ardmillan, 6 Macp. at p. 144. See also *Eadie v. Mac-kinlay* (7th February 1815), F.C.; *Laurie v. Black* (1831), 10 Sh. 1; *Connal and Co. v. Loder* (1868), 6 Macp. 1095; Bell's *Com.* i. 195, and M'Laren's note. As to the law of England see *Wood v. Manley* (1834), 11 A. & E. 34; *Salter v. Woolams* (1841), 2 M. & G. 650; *Wood v. Tassell* (1844), 6 Q.B. 234; *Buddle v. Green* (1857), 27 L.J. Ex. 33.

⁴ *Startup v. Macdonald* (1843), 6 M. & Gr. 593. In this case the jury had found as a matter of fact that a tender of a quantity of oil at half-past eight o'clock on a Saturday night was unreasonable. The Court held that such a question should not have been left to the jury, but was a matter of law to be determined by the Court, and that in law the hour was reasonable. The sub-section alters this rule.

Sect. 29. expense to take the steps necessary for implementing his obligation to deliver.”¹ Strange to say, there is no direct authority on this subject in the common law of England, and an American case is cited by Benjamin.² Where the goods are to be shipped “free on board” the seller must bear the expenses of shipment.³ Where a document of title is given or tendered as delivery, it must be free from lien or charges in favour of the custodian of the goods, and in any case, in the absence of contrary agreement, the seller is bound to free the goods from such charges and encumbrances.⁴

Sect. 30.

**DELIVERY OF
WRONG
QUANTITY.**

30.—(1.) Where the seller delivers^(a) to the buyer a quantity of goods less than he contracted to sell, the buyer may reject^(b) them, but if the buyer accepts^(c) the goods so delivered he must pay for them at the contract rate.^(d)

(2.) Where the seller delivers^(a) to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept^(c) the goods included in the contract and reject^(b) the rest, or he may reject the whole. If the buyer accepts^(c) the whole of the goods so delivered he must pay for them at the contract rate.^(d)

(3.) Where the seller delivers^(a) to the buyer the goods he contracted to sell mixed with goods of a different description^(e) not included in the contract, the buyer may accept^(c) the goods which are in accord-

¹ M. P. Brown on *Sale*, p. 200. See also Bell on *Sale*, p. 79; Story on *Sale*, Sect. 297a; French Civil Code, Art. 1608. The illustrations of the law of Scotland, cited by M. P. Brown, relate exclusively to heritage.

² *Cole v. Kew* (1848), 20 Verm. 21.—Benjamin, p. 707. But see *Playford v. Mercer* (1870), 22 L.T. N.S. 41.

³ *Stock v. Inglis* (1884), 12 Q.B.D. 564, per Brett, M.R., at p. 573; *Affid.* (1885), 10 App. Ca. 263.

⁴ Sect. 12 (3). See *Playford v. Mercer* (1870), 22 L.T. N.S. 41.

ance with the contract and reject^(b) the rest, or he may **Sect. 30.** reject the whole.

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.⁽⁷⁾

NOTES.

(a) "*Delivery.*" Defined Sect. 62 (1), "The seller does not comply with his contract by the tender or delivery of either more or less than the exact quantity contracted for, or by sending the goods sold mixed with other goods."¹

(b) *Rejection of goods.* See Sect. 11 (1) and (2). It has been held that where the seller's obligation was to deliver "*on or before*" a certain date, and the buyer's to pay on the completion of the delivery, a partial delivery before the date specified did not necessarily involve acceptance of the part by the buyer so as to preclude him afterwards rejecting on the ground that the remainder of the seller's obligation had not been implemented.² A contrary rule was laid down in a more recent case,³ and the latter rule seems embodied in the closing words of Sub-sect. (1) (See *COM. infra*, p. 144). A testing of the goods, though made for the purpose of ascertaining the quality (not the quantity), does not appear to preclude the buyer from afterwards rejecting under Sub-sect. (2).⁴

(c) "*Acceptance.*" See Sect. 35 and note (b) *supra*.

(d) "*The contract rate.*" The acceptance by the buyer of a quantity smaller or larger than that in the contract, forms a new contract, and the ordinary rule would be payment according to *value*.⁵ But the section fixes the value at the contract rate which, in the common case, forms the best criterion.

(e) "*Description.*" In this section and in Sect. 14 (1) "*description*" refers to the nature of the goods themselves (*i.e.* the *kind* of goods), not to the manner in which the *species* is

¹ Benjamin, p. 696.

² *Waddington v. Oliver* (1805), 2 B. & P. 61.

³ *Ozendale v. Wetherell* (1829), 9 B. & C. 386.

⁴ *Cunliffe v. Harrison* (1851), 6 Ex. 903. See *COM.*, Sect. 35 *infra*, p. 170.

⁵ "When some of the goods have been delivered, and the vendee does not return them upon the failure of the vendor to perform his part of the contract, the latter may bring an action for the *value* (not the stipulated price) of those goods."—Per Bayley, J., in *Shipton v. Casson* (1826), 5 B. & C. 378 at p. 383.

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represented in written or spoken language. The latter is the meaning in Sects. 13, 14 (2), and 18 (Rule 5).

(f) See Sect. 55 and *Com. post*, p. 258.

COMMENTARY.

Sub-sects. (1)
and (2).
Law of Scot-
land.

The law of Scotland as to Sub-sects. (1) and (2) appears to have been assumed. If the rules embodied in these sub-sections formed part of the law of England prior to the Act, they should *a fortiori* have applied to Scotland, where the buyer's power of rejection is much greater.¹

Jaffray v.
Boag.

The principle of the first sub-section was recognised in *Jaffray v. Boag*² (1824), where a cask of oil was alleged by the buyer to be five gallons short of the invoice quantity. In intimating this to the seller, the buyer proposed a new arrangement, and afterwards pleaded that the seller's silence inferred his acquiescence. The Court held that the buyer, by selling the cask, had passed from any objection to the quantity, and was bound to pay the full contract price. In

Richardson v.
Roscoe.

*Richardson v. Roscoe and Rigg*³ (1837), commission agents advised their principals of a purchase of seal oil according to order, but afterwards sent an invoice for about half the quantity, which the principals declined to take. It turned out that the agents had diverted the remainder of the oil to an alleged prior order from other principals, a proceeding which in law converted them, in a question with the buyer, into principals selling on their own account.⁴ It was held

Jaffé v.
Ritchie.

that the buyer was not bound to accept a less quantity than that ordered. In *Jaffé v. Ritchie*⁵ (1860) the main question was as to the substitution of jute for flax, but the seller urged that only a very *small proportion* of the goods were not of the description ordered. Lord Justice-Clerk Inglis, while regretting that the facts had not been more accurately ascertained, held that "on clear principles of law the pur-

¹ See *Com.*, Sect. 11 *ante*, p. 52.

² 3 Sh. 375 (N.E. 266).

³ 15 Sh. 952.

⁴ On this point see *Ireland v. Livingston* (1872), L.R. 5 H.L. 395, per Lord Blackburn at p. 410, and *Robinson v. Mollett* (1875), L.R. 7 H.L. 802.

⁵ 23 D. 242.

suers must prevail, because there had been a breach of contract on the part of the seller in failing to deliver the commodity bargained for *to its full extent*.”¹ **Sect. 30.**

Where several separate articles are included in the same contract, the buyer is not bound to accept part if the whole cannot be delivered,² unless the contract contemplates a separation of the obligations³ or the buyer acquiesces in a partial delivery.⁴ **Separate articles.**

In Scotland, a breach of contract arising from defective quantity in deliveries, made in single bulk or simultaneously, was generally treated as subject to the same rules as a breach arising from defective quality. If the buyer did not timeously reject the goods and repudiate the contract, he was held to have passed from the objection and to be liable in the full contract price.⁵ But in the case of defective quantity, a principle resembling the buyer's alternative remedies under this Act⁶ may be gathered from the House of Lords judgment in *Robertson v. Harford Brothers and Co.*⁷ (1832), where Lord Chancellor Brougham said: “If I buy a dozen of wine and I only get ten—if I drink the ten bottles and am called upon to pay for twelve, it is absurd to say you must pay for twelve—you ought to have taken the objection when the ten bottles came, and said, this is **Relation of quantity to quality.**”

¹ 23 D. at p. 249. The following Scottish cases also relate to deliveries alleged to have been defective in quantity—*Shewell v. Mowbray* (1678), Mor. 14233; *Smith v. Napier* (1804), Hume, 388; *Galletly v. Child* (1824), 3 Sh. 142 (N.E. 95); *Whitson v. Neilson and Co.* (1828), 6 Sh. 579; *Schuermans and Son v. Stephen and Sons* (1832), 10 Sh. 839; *Fraser v. Outram* (1834), 13 Sh. 84.

² *Champion v. Short* (1807), 1 Camp. 53; *Hamilton v. Hart* (1830), 2 Sh. 596. In the latter case two horses sold together, were held to have been sold as a pair, and one of them proving unsound, the buyer was found entitled to reject the other. The same principle operates in favour of the seller. Thus in *Elliott v. Thomas* (1838), 3 M. & W. 170, Parke, B., said: “That was a joint order for common steel and cast steel; the effect of such a joint order, unless explained, would be to make it one entire contract, since we must assume that one article would not have been furnished at one stipulated price unless the other had been agreed to be paid for at the other price”—3 M. & W. at p. 176.

³ *Hall and Sons v. Scott* (1860), 22 D. 413; *Linn v. Shields* (1863), 2 Macp. 88; *Higgin v. Pumpherson Oil Co. Ltd.* (1893), 20 Ret. 532.

⁴ *Smith v. Napier* (1804), Hume 388; *Bragg v. Cole* (1821), 6 Moore 114.

⁵ As in *Jafray v. Boag* (1824), 3 Sh. 375 (N.E. 266), referred to in text *supra*.

⁶ See Sect. 11 (2).

⁷ 6 W.S. 1, reversing Court of Session judgment *sub nom. Harford Brothers and Co. v. Robertson* (1831), 9 Sh. 352.

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not a dozen—here are only ten. That applies if I had bought wine expecting it of one vintage and it turned out to be of another, and expecting it was good though it turned out to be bad. It is too late to take the objection.”¹

*Waddington
v. Oliver.*

In the English case of *Waddington v. Oliver*² (1805), the plaintiff delivered 12 bags of hops on 12th December in part performance of a contract to deliver 100 bags on or before 1st January. His demand for immediate payment of the price of the 12 bags was held premature, the contract time not having expired. The contract seems to have contemplated a single delivery of the whole quantity, and therefore the buyer was not entitled to demand a part without taking the whole.³ It is doubtful if this judgment could now be maintained, in view of the express provision of the first sub-section, that, if goods are *accepted*, they must be paid for at the contract rate.⁴ The rule in Scotland seems to be in accordance with the sub-section. In the circumstances of *Waddington's Case* the seller is not bound to make a partial delivery, but if such delivery is necessary, *e.g.* on account of the bulky or ponderous nature of the goods, or if, in any circumstances, it is made with the buyer's consent, the seller is entitled to obtain in exchange, a proportion of the price corresponding to the part delivered.⁵

Its relation to
the present
Act and to the
law of Scot-
land.

Effect of sec-
tion upon
instalment
deliveries.

In instalment deliveries where the seller fails in the first delivery, and thus commences with a breach, it was held in *Hoare v. Rennie*⁶ (1859) and *Honck v. Muller*⁷ (1881) that the buyer might cancel the whole contract on giving notice. The question is not free from difficulty,⁸ but, assum-

¹ 6 W.S. at p. 25.

² 2 B. & P. N.R. 61.

³ “If a man contracts to buy 150 quarters of wheat he is not at liberty to call for a small portion without being prepared to receive the whole quantity.”—Per Wilde, C. J., in *Kingdom v. Cox* (1848), 5 C.B. 522 at p. 526.

⁴ And see before this Act *Oxendale v. Wetherell* (1829), 9 B. & C. 386; *Colonial Insurance Co. v. Adelaide Marine Insurance Co.* (1886), 12 App. Cas. 128.

⁵ “In many cases strict adherence to the rule of payment on delivery, where subjects are of such bulk that they must be delivered in parcels, would cause great inconvenience, and therefore in practice this is seldom required, but it is nevertheless the strict legal right of parties.”—Per Lord Justice-Clerk Inglis in *Hall and Sons v. Scott* (1860), 22 D. 413 at p. 420. See also *Linn v. Shields* (1863), 2 Macp. 88, per Lord Justice-Clerk Inglis at p. 93.

⁶ 5 H. & R. 19.

⁷ 7 Q.B.D. 92.

⁸ It is discussed in connection with Sect. 31 Com. *post*, p. 149.

ing the law to be correctly stated, the buyer's remedy of rejection seems a consequence of this section as well as of Sect. 30. Sect. 31. If the seller has a right to receive payment at the contract rate for the goods actually delivered, such right will result from Sub-sect. (1) of this section.

In connection with quantities difficulties often arise from the use of special or approximate words such as "cargo," "say from," "about," "not less than," "more or less," "averaging," etc.¹ Among Scottish cases is that of *Tancred, Arrol, and Co. v. The Steel Co. of Scotland*² (1890), where it was held that a contract to supply "the whole of the steel required by you for the Forth Bridge" was not limited by the subsequent words, "the estimated quantity of the steel we understand to be 30,000 tons more or less." "I think," said Lord President Inglis, "these are mere words of expectation, or understanding, or estimate, but they certainly do not limit the very emphatic words with which the contract begins."³ In the House of Lords the judgment of the Court of Session was unanimously affirmed.⁴ In the

Words in contract denoting quantity.

Tancred, Arrol, and Co. v. Steel Co. of Scotland.

¹ A list of such words with illustrative cases will be found in Chalmers' *Commentary* on the Act, p. 177.

² 17 Ret. H.L. 31. In Court of Session, *sub nom. Steel Co. of Scotland v. Tancred, Arrol, and Co.*, 16 Ret. 440.

³ 16 Ret. at p. 451. See also *Walls and Co. v. Greenshields and Co.* (1875), Sh. Ct. Glasgow, Guthrie's Sel. Ca. 1st ser. 527.

⁴ Lord Shand in the Court of Session specially referred to and founded on the following authorities, *Gwilling v. Daniel* (1835), 2 C. M. & R. 61; *M'Connell v. Murphy* (1873), L.R. 5 P.C. 203; *Brawley v. United States* (1877), 6 Otto Amer. Rep. 168. The cases of *Leeming v. Smith* (1851), 16 A. & E. 275, and *Morris v. Levison* (1876), L.R. 1 C.P.D. 155, which had been cited in argument, were considered by Lord Shand to be special and not applicable (16 Ret. at p. 457). In the American case of *Brawley v. United States*, approved of in *The Steel Co.'s Case* (*supra*), the Supreme Court of the United States laid down the following rules:—"Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of 'about' or 'more or less,' or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount in reference to which good faith is all that is required of the party making it. . . . But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or

Sect 30.

*North British
Oil Co. v.
Swann.*

case of *North British Oil Co. v. Swann*¹ (1868) a contract to supply as much cannel coal (within certain limits) as the pursuers (a manufacturing company) might "require," was interpreted, not to mean as much as the pursuers should demand, but as much as they should require for the purpose of their manufacture.²

Further cases illustrative of Sub-sects. (1) and (2) are noted below.³

Sub-sect. (3)
Extension of
previous law.

The rule of Sub-sect. (3) as to mixed goods probably goes a step further than the common law of England. It is clear that, prior to the Act, a buyer was not bound to keep goods where there was risk, trouble, or expense in separating the contract goods from those with which they were mixed.⁴ The Act empowers the buyer to reject in every case.

deficiencies in number, measure, or weight. If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significance, then the contract is to be governed by such added stipulations or conditions, as if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it *shall require* for the use of his mill."—Per Mr. Justice Bradley, 6 Otto at pp. 171, 172. ¹ 6 Macp. 835.

² Another application of "required" will be found in *Tancred, Arrol, and Co. v. Steel Co. of Scotland* (1890), 17 Ret. H.L. 31. See also the opinion of Mr. Justice Bradley quoted *supra*.

³ Sub-sect. (1).—*Reuter v. Sala* (1879), 4 C.P.D. 239, where the contract was for 25 tons Penang pepper, only 20 tons of which complied with the terms of the contract as to shipment. The buyer was held entitled to reject the 20 tons; *Richardson v. Dunn* (1866), 2 Q.B. 222, where 152 tons of coal were delivered and retained on an order for 200 or 300 tons; *Oxendale v. Wetherell* (1829), 9 B. & C. 386, where the buyer kept 130 bushels wheat delivered under a contract for 250. These cases illustrate the latter part of the sub-section. The case of *Oxendale v. Wetherell* was approved by the Privy Council in *The Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.* (1886), 12 App. Ca. 128.

Sub-sect. (2).—In *Cross v. Eglin* (1831), 2 B. & Ad. 106, an order was given for "about 300 quarters, more or less, of foreign rye," and "50 quarters foreign red wheat." The buyers were held entitled to reject a delivery of 345 quarters of the one, and 91 quarters of the other. In *Hart v. Mills* (1846), 15 M. & W. 85, the order was for four dozen wine, and eight dozen were sent; it was held that the whole might be returned. In *Cunliffe v. Harrison* (1851), 6 Ex. 903, fifteen hogsheds of claret were delivered instead of ten. Parke, B., said "the delivery is no performance of the contract, for the person to whom the hogsheds are sent cannot tell which are the ten that are to be his; and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him" (6 Ex. at p. 906).

⁴ *Levy v. Green* (1857), 8 E. & B. 575 (crookery ware in a crate containing articles in excess of the order and of a different pattern); *Nicholson v. Bradfield Union* (1866), L.R. 1 Q.B. 620 (coal partially delivered in terms of

The use of the word "*mixed*" implies that the goods are mingled in one covering or package, or are delivered in such a manner as of necessity to involve trouble in the separation. The delivery of goods additional to the contract quantity, but in separate lots, cannot be properly called a mixed delivery.

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"Mixed delivery."

31.—(1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery^(a) thereof by instalments.^(b)

Sect. 31.
INSTALMENT
DELIVERIES.

(2.) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for,^(c) and the seller makes defective deliveries^(d) in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation^(e) of the whole contract or whether it is a severable breach giving rise to a claim for compensation^(f) but not to a right to treat the whole contract as repudiated.

NOTES.

(a) "*Delivery.*" Defined Sect. 62 (1).

(b) This sub-section leads to the same result as Sub-sect. (1) of Sect. 30. A buyer is not bound to accept a less quantity than that contracted for. The rule may, however, be varied by "usage of trade, special agreement, or course of dealing" [Sect. 30 (4)].¹ If the buyer accepts and retains an instalment he will

contract, but seller afterwards "shoots in" a lot of a kind not contracted for, which gets mixed with the first delivery). See also *Rylands v. Kreitman* (1865), 19 C.B. N.S. 651.

¹ See *Whitson v. Neilson and Co.* (1828), 6 Sh. 579. In many cases the weight or bulk of the goods precludes delivery in one lot. On the other hand, a buyer is not (apart from agreement) entitled to call for a portion of the goods without being prepared to receive the whole—*Kingdom v. Cox* (1848), 5 C.B. 522, per Wilde, J., at p. 526. See Com., Sect. 30 *ante*, p. 144.

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be liable for the price at the contract rate, even if there should afterwards be a breach on the part of the seller in regard to the remaining instalments.¹

(c) "*Separately paid for.*" In Scotland, in the absence of express or implied agreement, the strict rule is that payment is due for each instalment as delivered.² The rule in England prior to the Act seems to have been different: "Where there is an entire contract to deliver a large quantity of goods consisting of distinct parcels within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of that part delivered because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered."³

(d) "*Defective deliveries.*" These may be by way either of short quantity or total failure in delivery.

(e) "*Repudiation,*" "*compensation.*" Compare with Sect. 11 (1) (b), and see definition of "*warranty,*" Sect. 62 (1).

COMMENTARY.

Difficulties as to continuing contracts.

Continuing contracts, which are now very common in connection with supplies of iron and coal, present difficulties which are not satisfactorily met by the present section. The conflicting views are embodied in the alternatives pre-

¹ *Ozendale v. Wetherell* (1829), 9 B. & C. 386, modifying or correcting *Waddington v. Oliver* (1805), 2 B. & P. N.R. 61. See COM., Sect. 30 *ante*, p. 144.

² It has been laid down in Scotland that where the character of the goods or the terms of the contract justify a delivery in lots or instalments the strict rule is payment for each lot as delivered, though, apart from contract, payment is seldom required. See *dicta* of Lord Justice-Clerk Inglis in *Hall and Sons v. Scott* (1860), 22 D. at p. 420; and in *Linn v. Shields* (1863), 2 Macp. at p. 98. If over-payments of certain instalments of the price are made through mutual error, these may be corrected in a subsequent accounting—*Baird's Trustees v. Baird* (1877), 4 Ret. 1005.

³ Per Parke, J., in *Ozendale v. Wetherell* (1829), 9 B. & C. 386 at p. 387, quoted in *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.* (1886), 12 App. Ca. at p. 138. In the *dictum* quoted, there is apparently an attempt to reconcile *Ozendale's Case* with the earlier case of *Waddington v. Oliver* (1805), 2 B. & P. N.R. 61, but the latter case presents difficulties which are referred to elsewhere. See COM., Sect. 30 *ante*, p. 144. The same difficulties suggest themselves in connection with the statement of Benjamin, that the buyer "may return the parcels first received if the later deliveries be not made" (*Sale*, p. 898). What, it may be asked, is the buyer's relation to the first parcels while in his possession? Are they only tentatively and conditionally accepted, or are they not accepted at all? The Act seems to support the Scottish rule.

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sented by the second sub-section, but we are not much aided by the statement that it depends on the terms of the contract and the circumstances of the case which of the alternatives is to be adopted. Where there is a breach of an instalment delivery or of an instalment payment, is the seller or buyer not in fault entitled to declare himself relieved from all further obligations under the contract, or is he bound to treat the instalment as a separate contract and to continue to implement his obligations in respect of the remaining instalments? In the latter case, it is clearly his duty to ascertain and possibly minimise the loss arising from the particular breach, by going immediately into the market and selling or buying, as the case may be, against the party in fault. But the question is generally complicated by variations upon the terms of the original contract arising from mutual convenience or from forbearance on the part of seller or buyer. It may suit both parties to delay deliveries or to alter the quantities; or one of the parties, with the acquiescence of the other, may depart from the strict terms of the contract. The questions thence arising require for their solution the application of legal principles, which differ considerably in England and Scotland. Thus, in England, it is said that "a breach by the party suing is a breach of only a part of the *consideration moving from him*, and such a breach may be compensated in damages without any necessity for annulling the whole contract."¹ This is an application of the doctrine of "Consideration," a doctrine which the law of Scotland does not recognise,² and not only so, but the principle enunciated in the *dictum* is inconsistent with the option given to the purchaser in Scotland under Sect. 11 (2). Again, where the terms of the contract have not been strictly adhered to, it is necessary in England to enquire whether the alteration was of mutual consent, or arose from the forbearance of one of the parties. If of mutual consent, or if the party benefiting by the forbearance is the plaintiff claiming full implement, it may be

Different legal principles in England and Scotland.

¹ Per Brett, L. J., in *Reuter v. Sala* (1879), 4 C.P.D. 239 at p. 257.

² See Notes on the English doctrine of "Consideration," Appendix III. *post*, p. 341.

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found that the original contract is rescinded, and that the alteration, being in law a new contract, is void under the Statute of Frauds or the corresponding provisions of this Act.¹ No such question can arise in Scotland, neither the Statute of Frauds nor Sect. 4 of this Act having any application.² A third principle having no counterpart in Scotland, is suggested by the wording of the present section, which seems founded on the English distinction between a condition and a warranty, or, in other words, between a contract and a "collateral agreement."³

Conflicting
decisions in
England.

The English decisions are not easily reconciled with themselves, and therefore, even apart from the differences in principle above referred to, they are not to be relied on as illustrating the law of Scotland. In *Hoare v. Rennie*⁴ (1859) the seller failed to give full delivery of the first instalment, and in *Honck v. Muller*⁵ (1881) the buyer failed to accept delivery of the first instalment. In both cases it was held that delivery and acceptance at the time specified were conditions precedent, a breach of which entitled the party not in fault to repudiate the whole contract.⁶ But in the interval between these two cases it was decided in *Simpson v. Crippin*⁷ (1872) that a breach by the buyer in regard to one of the instalments⁸ did not justify the seller in rescinding the entire contract. A similar judgment was given in *Freeth v. Burr*⁹ (1874), where Coleridge, C. J., said: "In cases of this sort where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether refuse performance of the contract."¹⁰ These conflicting decisions were

¹ Sect. 4. See *Ogle v. Earl Vane* (1868), L.R. 3 Q.B. 272; *Hickman v. Haynes* (1875), L.R. 10 C.P. 598; *Plevins v. Downing* (1876), 1 C.P.D. 220; Benjamin, pp. 189, 692.

² See Notes on the history of the Statute of Frauds, App. III. *post*, p. 343.

³ Compare this section with Sub-section 11 (1) (b), and contrast with Sub-section 11 (2) embodying the Scottish rule.

⁴ 5 H. & N. 19.

⁵ 7 Q.B.D. 92.

⁶ See also *Reuter v. Sala* (1879), 1 C.P.D. 239.

⁷ L.R. 8 Q.B. 14.

⁸ In this case, as in the others previously mentioned, it was the *first* instalment.

⁹ L.R. 9 C.P. 208.

¹⁰ L.R. 9 C.P. at p. 213. See also *Brandt v. Lawrence* (1876), 1 Q.B.D. 344.

supposed to be reconciled by the House of Lords judgment in *Mersey Steel and Iron Co. v. Naylor*¹ (1884), where the breach was on the part of the buyer in refusing to make payment of the first instalment under the mistaken impression that he was prevented from doing so by a petition having been presented for the winding up of the selling company. The principle stated by Lord Coleridge² in the passage above quoted, was approved of both in the Court of Appeal and in the House of Lords. Lord Selborne stated the test thus: "You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part."³

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Mersey Steel and Iron Co. v. Naylor.

In reference to this last decision the editors of Benjamin [4th edition] say "an intelligible principle having been arrived at, it is unnecessary to attempt to reconcile the conflicting decisions in *Hoare v. Rennie*, *Simpson v. Crippin*, and *Honck v. Muller*. Each case may possibly be supported on the particular facts there presented."⁴ The principle referred to is embodied in the section now under consideration, but, as already suggested, it does not carry us far. To say that each case is to be decided with reference to its own circumstances, does not materially guide us in applying the law to the circumstances.

In applying the section to Scotland it is to be noted that its terms do not necessarily involve the construction which has been given in England to this class of contracts, and, as above observed, there are various reasons why, in this instance, English case-law is of comparatively little value. It will be found that, as a rule, greater regard is

Application of section to Scotland.

¹ 9 App. Ca. 434.² In *Freeth v. Burr* (1874), L.R. 9 C.P. 208 at p. 213.³ 9 App. Cas. at p. 438.⁴ Benjamin, p. 590.

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Contrast between Scottish and English cases.

paid in Scotland than in England to the unity of the contract, and the mutuality of its obligations.¹

Most of the English cases turn upon the question whether a branch of an instalment is separable, so as to preserve intact the remaining instalments in face of declared repudiation by the party not in fault. In no Scottish case has a principle been recognised approaching to that of *Simpson v. Crippin*² where, notwithstanding an admitted breach of an instalment on the part of the buyer, and an immediate repudiation of the whole contract on the part of the seller, the latter was held bound in regard to remaining instalments, just as if no breach had taken place.³ In one case in Scotland, to be afterwards noticed,⁴ the agreement expressly bore that each instalment should form a separate contract, yet, even here, the question was not whether there was rescission of the whole, in consequence of a breach of one, but whether there was constructive mutual abandonment of all obligations so far as not implemented.

Scottish decisions.

Barclay v. Anderston Foundry Co.

The Scottish law on the subject is practically confined to five cases, three of which are of very recent date.

In *Barclay v. Anderston Foundry Co.*⁵ (1856) extensive changes were made of mutual consent, both in the time of delivery and the mode of payment. Bills by the buyer for the price having been dishonoured, an entirely new arrangement for payment was entered into, after which the buyer demanded the remaining instalments. The sellers resisted, on the ground that the new arrangement inferred an abandonment of any further right or obligation under the

¹ "It is very important that we should express our determination to abide by the well-established rule of Scotch law, that, in mutual contracts, there is no ground for separating the parts of the contract into independent obligations, so that one party can refuse to perform his part of the contract, and yet insist upon the other performing his part. The unity of the contract must be respected."—Per Lord Benholme in *Turnbull v. M'Lean and Co.* (1874), 1 Ret. 730 at p. 739. See also Lord Justice-Clerk Moncreiff to the same effect at p. 738.

² (1872) L.R. 8 Q.B. 14.
³ "To say that where a contract is to be implemented by instalments, the furnishings of one month are totally independent of the next, is an egregious fallacy."—Per Lord Neaves in *Turnbull v. M'Lean and Co.* (1874), 1 Ret. 730 at p. 739.

⁴ *Higgin v. Pumpherson Oil Co. Ltd.* (1893), 20 Ret. 532.

⁵ 18 D. 1190.

original contract. The buyer did not deny the sellers' right to repudiate, but urged that they should have given distinct notice at the time of the breach, of their intention to do so. This plea was negatived.¹ **Sect. 31.**

In *Turnbull v. M'Lean and Co.*² (1874) there were, in like manner, innovations of mutual consent upon the terms of the original contract. The question, however, arose, not out of these, but out of a refusal by the buyer to make payment of one of the instalments until certain counter claims at his instance, which turned out to be unfounded, had been settled. The sellers *there and then* repudiated the whole contract so far as not implemented, and they were held entitled to do so. *Turnbull v. M'Lean and Co.*

In *Higgin v. Pumpherston Oil Co. Ltd.*³ (1893) the contract was for 20 tons paraffin-wax in instalment deliveries over twelve months, with an express provision, which did not occur in any of the previous reported cases either in England or Scotland, that "each delivery shall constitute a separate contract." No deliveries were made or asked during the first six months, and only 3 tons were asked and delivered during the second six months, but at the close of the twelve months the buyer insisted upon delivery of the remaining 17 tons. The sellers resisted the claim, but offered 2 tons, being more than the proportion effeiring to the month. The Court held that the buyer had no claim beyond the amount offered. It was found that there were twelve distinct contracts, but this circumstance did not affect the principle of the decision, which was that the parties, by their conduct, had released each other of their respective obligations, so far as these had not been implemented. *Higgin v. Pumpherston Oil Co. Ltd.*

In *Barr v. Waldie*⁴ (1893) there was no provision that each instalment should form a separate contract, and, although the point did not directly arise, it seems to have *Barr v. Waldie.*

¹ "In a continuing contract such as this, it seems to me that a persevering neglect to make the periodical payments stipulated for, in consideration of the obligations undertaken to make periodical deliveries of the article sold, did not require previous notice to entitle the seller to act on the footing of the contract being at an end."—Per Lord Cowan, 18 D. at p. 1198.

² 1 Ret. 730.

³ 20 Ret. 532.

⁴ 21 Ret. 224.

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been assumed that the contract was indivisible. The attention of the Court was chiefly directed to the question whether a stipulation for delivery of 2500 tons coal "in equal monthly quantities, in lots of 300 tons maximum," gave an option to the buyer to fix the equal deliveries at any quantity he chose under the maximum. This was held to be an unreasonable interpretation, and, therefore, the Court read into the contract a provision that each monthly instalment should *amount* as nearly as possible to 300 tons. The soundness of this part of the decision can scarcely be questioned, but the case goes further, and seems to assume that the contract became *ipso facto* null by the failure timeously to take delivery.¹

*Ireland v.
Merryton
Coal Co.*

In *Ireland and Son v. The Merryton Coal Co.*² (1894), the contract was for 3000 tons coal "in average monthly quantities over the next four months." It was held that the sellers were not bound to deliver 3000 tons irrespective of the period of delivery, but that the contract was for four monthly deliveries of about 750 tons each. "I regard the contract," says the Lord Ordinary (Stormonth Darling), "as one contract, and not four contracts; but I think the deliveries were to be spread over the four months in nearly equal proportions, with the result that, if the purchaser failed to take something like the proper proportion in any month, he was not entitled to demand delivery of that quantity in succeeding months."³ This view was adopted by the Court, but it is open to the observation that there is very little difference between four separate contracts for 750 tons each, and one contract for 3000 tons, so divided into sections of 750 tons, that no obligation under one section can be carried forward into another. Starting from the same premises of a united and yet divisible contract, the Lord Ordinary and the Court arrived

¹ "The pursuer had a right to the delivery of 300 tons per month, for each successive month after the date of the contract, until the quantity was exhausted. The deliveries were to be made monthly in equal quantities. If he did not choose to take delivery within these months he had no further right. For the contract necessarily expired with the time required for the delivery of the total amount."—Per Lord Rutherford Clark, 21 Ret. at p. 228.

² 21 Ret. 989.

³ 21 Ret. at p. 991.

at different conclusions. The former thought that in no single month was there such an absolute repudiation of the contract as to make it essential for the party not in fault to make an appeal to the market so as to fix the damages. The contract in the opinion of the Lord Ordinary "was treated by both parties as in full vitality" until within a day or two of the close of the whole contract period, and, therefore, the damages for short deliveries fell to be fixed as at the date of the claim. The Second Division, while agreeing that the buyers were excluded from any right to arrears of deliveries, not asked for during the month to which the deliveries applied,¹ held in regard to the months in which deliveries were asked and not received, that, as the buyers could have gone into the market and bought in coal to supply the deficiency, they were not entitled to greater damages than the difference between the contract price and the market price for the month. In a rising market the amount of damages was thus greatly lessened.²

The three more recent Scottish cases above referred to agree in an important particular. There was no distinct repudiation of the contract by the party not in fault, and, even where one of the parties urged the other to conform more nearly to its terms, this was done, not with the object of cancelling the contract or any of its divisions, but merely to suit the convenience of the hour. If the contract was not cancelled, there was clearly waiver of the breach by the party not in fault, and, therefore, if these cases are good law, the result is that, not only is time of delivery an essential condition in all instalment sales, but a breach of the condition cannot be waived by the actings of parties. This seems inconsistent with Sects. 11 (2), 53, and 55 of the Act.

Effect of Act
upon recent
Scottish cases.

¹ "There was no breach of contract in not delivering what the pursuers did not want, did not ask for, and could not take."—Per Lord Trayner, 21 *Ret.* at p. 993.

² During the continuance of a contract for a daily supply of coal the buyers were held entitled to bring an action for damages for past deficiencies, reserving further claims, and were also held entitled after the expiry of the contract to bring a second action—*Jackson v. Cowie and Sons* (1872), 9 S.L.R. 617.

Sect. 32.
DELIVERY TO
CARRIER.

32.—(1.) Where, in pursuance of a contract of sale,^(a) the seller^(b) is authorised or required^(c) to send the goods^(b) to the buyer,^(b) delivery^(d) of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie*^(e) deemed to be a delivery^(d) of the goods to the buyer.

(2.) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier^(f) on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit,^(g) the buyer may decline^(h) to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible^(h) in damages.

(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit,⁽ⁱ⁾ under circumstances in which it is usual to insure, the seller must give such notice to the buyer^(j) as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

NOTES.

(a) "*Contract of sale.*" Defined Sects. 1 and 62 (1).

(b) "*Seller,*" "*buyer,*" "*goods.*" Defined Sect. 62 (1).

(c) "*Authorised or required.*" The rule of Sect. 29 as to delivery is here superseded by express or implied contract. "*Authorised*" seems to refer to a voluntary act of the seller, sanctioned by express or tacit acquiescence on the part of the buyer; "*required*" is the appropriate word where delivery to the buyer is an express term of the contract, or is so implied as to form part of the seller's obligation.

(d) "*Delivery.*" Defined Sect. 62 (1). In the case of unascertained or future goods, delivery to a carrier is also an "*appropriation*" of the goods to the buyer so as to pass the property to him [Sect. 18, Rule 5 (2)]. The sub-section makes no distinction between goods delivered to a carrier for transmission from one part of England to another, and goods delivered to a carrier for transmission to or from a foreign country. The suggestion of Grove, J., in *Pointin v. Porrier*¹ (1885) that the English rule does not apply to consignments from abroad, is totally unsupported by authority, and is opposed to the opinion of Manisty, J., in the same case.²

(e) "*Prima facie.*" The general rule yields to evidence of contrary intention, as where the seller reserves the *jus disponendi* by taking the bill of lading to the order of himself or his agent [Sect. 19 (2)], or where he altogether prevents delivery by making the carrier his own, and not the buyer's agent. Even where the carrier receives the goods on behalf of the buyer, he is not entitled without special authority to *accept* them in the sense of Sect. 35. On the other hand, though the carrier may be the seller's agent, the buyer, in the absence of contrary agreement, takes the risk of deterioration necessarily incident to the transit. (Sect. 33).

(f) "*Contract with the carrier.*" The rule of this sub-section

¹ Q.B.D. 49 J.P. 199.

² The Divisional Court was composed of the two judges referred to. Grove, J., reasoned thus: "Here the parties know the law and the custom, but to apply that law to cases in foreign countries would, to my mind, be not only very dangerous, but might be used with very unjust and unfair results, and I am of opinion that it is incumbent upon parties in foreign countries to deliver to" [the buyer or his agent]. It was not necessary to decide the point, but Manisty, J., said: "Whether in the case of an order being given to a foreigner for certain goods to be sent to agents abroad, or direct to the person giving the order in England, delivery to a foreign railway company at the place where the consignor resides is a good delivery to the consignee or agent, is a question of great importance, and I should feel very sorry to throw doubt upon what is settled law so far as this country is concerned. If I order goods from a person abroad, and these goods are sent to me by the ordinary mode of carriage, the question of delivery is governed, in my opinion, by the same principles as govern delivery to a carrier in this country" (49 J.P. at p. 199). In *Brown v. Hodgson* (1809), 2 Camp. 36, the Attorney-General of the day attempted to establish the converse proposition, and distinguished between goods sent from one part of England to another, and goods sent from England to a foreign country. He argued that in the former case delivery to the carrier was delivery to the consignee, but in the latter, the risk was still the consignor's till the goods reached their destination. The bill of lading, however, bore that the goods were shipped "by order and on account of" the consignee, and Lord Ellenborough could "recognise no property but that recognised by the bill of lading." In Scotland, the law of the sub-section, whether applied to imports or exports, has never been in doubt. See *e.g.* *Prince v. Pallat* (1680), Mor. 4932, and Com. *infra*, p. 159.

Sect. 32.

is based on the cases noted below.¹ The seller is custodian of the buyer's goods, and is thus an agent for him, and bound to protect his principal (Sect. 20, 2nd proviso).

(g) "*Transit.*" For rules as to duration of transit, see Sect. 45.

(h) "*Decline delivery,*" "*hold seller responsible.*" The former of these alternative remedies is based on the property and risk being continued with the seller; the latter infers damages against the seller for neglect of duty as the buyer's agent. Where declinature of delivery is justified, the buyer's remedy is for breach of contract under Sect. 51 (1),² while the remedy for the seller's neglect to make a reasonable contract with the carrier, seems to fall under Sect. 57, rather than under Sect. 53. If the carrier is to be proceeded against, it is necessary, where delivery is declined, that the seller should pursue the action, but where the buyer accepts, and trusts to the seller's responsibility for damages, the action against the carrier should probably be at the instance of the buyer, as owner of the goods from the time when the transit commenced.³

(i) "*Sent by a route involving sea transit.*" The bill originally read "*sent by sea.*" It was altered in Select Committee of the Commons, to meet the case of combined land and sea carriage.

(j) "*Notice to the buyer.*" The duty here imposed on the seller was suggested by the law of Scotland, but the provision of the sub-section seems to go rather further than the Scottish rule (see COM. *infra*, p. 164). "There appears to be no English decision in point."⁴

COMMENTARY.

Sub-sect. (1).
Scottish law.

Sub-sect. (1).—The rule of this sub-section was established in Scotland as early as the case of *Prince v.*

¹ *Clarke v. Hutchins* (1811), 14 East 475; *Cothay v. Tute* (1811), 3 Camp. 129; *Buckman v. Levi* (1813), 3 Camp. 414; *Pointin v. Porrier* (1885), 49 J.P. 199. The seller "has an implied authority, and it is his duty, to do whatever is necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them in such a course of conveyance as that in case of a loss the defendant might have his indemnity against the carriers."—Per Lord Ellenborough in *Clarke v. Hutchins*, 14 East at p. 476. See also Indian Contract Act 1872, Sect. 91.

² "If the goods tendered are rejected, and properly rejected, by the buyer, there can be no doubt that the position remains the same as if the vendor had done nothing under the contract. There is no specific appropriation, and no transfer of property, and the vendor, if delivery under the contract is due, is liable to an action for non-delivery."—Campbell on *Sale of Goods*, 2nd ed., p. 514. Where rejection is not justified, the seller's remedy is under Sect. 50 (1).

³ See *Dawes v. Peck* (1799), 8 T.R. 330; *Dunlop v. Lambert* (1839), 6 Cl. and Fin. 600, and other cases noted by Benjamin (*Sale*, p. 164).

⁴ Chalmers on *Sale of Goods Act*, p. 66.

*Pallat*¹ in 1680. The circumstances were these. Udny, a Scotchman, ordered three tuns of wine from Pallat, a merchant in Bordeaux, to be sent in Gillespie's ship. Pallat shipped the goods, but hearing, after the vessel had sailed, that Udny was "about to break," he wrote to his correspondent, Wilson, to receive the wines from the "skipper" (shipmaster), and not to deliver them to Udny. The letter arrived before the wines, but in the meantime Udny had assigned them to Prince for onerous causes, and Prince arrested them in the skipper's hands and obtained decree of forthcoming. In a suspension Pallat urged among other pleas (1) that "the wines never became Udny's, *not being delivered to him*"; (2) that "there was here no sale but a mandate, for it is notour that Pallat is a factor, and furnishes goods *ex mandata*." It was answered for Prince, that "here there was a proper sale *perfected by delivery to the skipper* for behoof of Udny; neither did Pallat order the skipper to consign the wines to Wilson, his correspondent; neither did Pallat send the wines as factor, but sold them as merchant." The Lords found "that, the wines being delivered to the skipper upon Udny's order, *the property was stated in Udny*, and that there is no hypothec in ware for the price, by the law of Scotland."²

Sect. 32.

Prince v.
Pallat.

Reference is elsewhere made³ to a misconception as to the true nature of stoppage *in transitu*, which existed in Scotland between 1790 and 1849. This error lingered after the latter date in another form. It was supposed that, if there was stoppage *in transitu* in the case of a vessel chartered by the buyer, the reason must be that there was no delivery to the buyer.⁴

Effect upon de-
livery of error
as to stoppage
in transitu.¹ Mor. 4932.² Mor. 4932. See also *Dicksons and Co. v. Ponton* (1824), 3 Mur. 439 per Lord Chief Com. Adam at p. 440; *Dick v. Thom* (1829), 8 Sh. 232; *Jones and Co. v. Ross* (1830), 8 Sh. 495; Bell on *Sale*, p. 86. In some cases the rule is complicated with questions of stoppage *in transitu*, as in *Morton and Co. v. Abercromby* (1858), 20 D. 362.³ Com., Sect. 44 *post*, p. 205.⁴ Thus Ross in his *Leading Cases* published in 1855 (*Com. Law*, vol. ii. p. 801) states the then existing law thus: "The shipping of goods on board a vessel freighted by the purchaser of goods, is *not equivalent to delivery*, and does not prevent stoppage *in transitu*." In this statement he goes beyond the case on which he founds, for, although judgment was given in 1801, when the general error was unchecked, the report itself bears that "a great

Sect. 32.

But stoppage *in transitu*, as now understood, necessarily involves previous delivery to the buyer through the carrier as the buyer's agent. If there had been no delivery, the buyer's remedy would have been lien, not stoppage *in transitu*.¹ The effect upon delivery of embarking the goods in a ship chartered by the buyer is entirely one of circumstances [Sect. 45 (5)].

Sub-sect. (2).
Contract with
carrier.

Sub-sect. (2).—Scottish text-writers of the present century invariably state the rule as it is set forth in this sub-section, but the authorities are entirely English. The law is thus stated by Bell. "The seller may expressly or tacitly undertake to give the goods into the hands of a third party; to a wharfinger, or agent, or carrier, or ship-master. He will, in that case, be bound to perform such an act of delivery as shall fix the goods effectually on the proper person, so as to confer on the buyer the benefit of his purchase, or enable him to insist for his goods against a proper party. When the seller has done this, he is discharged of his duty; till it is done, he can have no action for the price, and the risk is still his."² Among English authorities cited by Scottish text-writers are *Clarke v. Hutchins*³ (1811) and *Buckman v. Levi*⁴ (1813), in both of which the seller's duty as the buyer's agent is clearly set forth by Lord Ellenborough.⁵

Sub-sect. (3).
Imported from
law of
Scotland.

Sub-sect. (3).—If, in regard to the preceding sub-section, the authorities are borrowed from England, this sub-section, on the other hand, affords one of the few

majority of the Court were of opinion that the delivery was *constructive* only, and did not prevent stoppage *in transitu*—*Robertson and Aitken v. More and Co.*, Mor. App. Sale, No. 3.

¹ "It is a contradiction in terms to say a man has a lien upon his own goods, or a right to stop his own goods *in transitu*. If the goods be his he has a right to the possession of them whether they be *in transitu* or not."—Per Buller, J., in *Lickbarrow v. Mason* (1793), 6 East 21 at p. 24.

² Bell on *Sale*, p. 84. See also Bell's *Com.* i. 274; Bell's *Prin.*, Sect. 118; M. P. Brown, p. 370. Where the buyer instructed coal to be sent from Glasgow to Inveraray by "gabbart," the seller's obligation was discharged by shipping them on board a gabbart employed as an ordinary trader between the two ports. In order to establish negligence in employing an unseaworthy vessel it was held necessary to prove *culpa lata* on the part of the seller—*Sword v. Milloy* (17th February 1813), F.C.

³ 14 East 475.

⁴ 3 Camp. 414.

⁵ These cases are narrated at some length by M. P. Brown—*Sale*, pp 370-373. See note (f) *supra*.

instances in which English law is founded on Scottish precedent. The earliest case is that of *Hoog v. Kennedy and Maclean*¹ (1754), where a Glasgow firm ordered goods from Rotterdam to be sent first ship for Leith, Greenock, or Bo'ness. The goods were duly shipped on 12th August, but no advice or bill of lading was sent by post to the buyers. The sellers forwarded on 3rd September an account-current, in which they took credit for goods sent by Burton (the master) for Leith, but neither goods nor ship were specified. The ship sailed on 25th August and on 4th September was lost. The report bears that "it was laid down as a general rule, that it is the indispensable duty of factors and others who deal by commission, to give regular notice of the shipping of the goods by course of post, and also to transmit a copy of the bill of lading." Lord Kames, who reports the judgment, asks: "Will the factor's neglect of duty subject him to every damage that might possibly have been prevented by a regular advice, or only the damage which is the necessary consequence of neglecting to give advice? In this case the buyers did not insure, as they might have done, on receipt of the advice which they actually got though late, therefore it might justly be presumed that they would not have insured though they had got the most early advice. Nevertheless the seller was held liable in damages."²

Sect. 32.

*Hoog v.
Kennedy.*

In *Cooper v. Green and Chatto*³ (1791) the goods were shipped on 19th December in a vessel which did not sail till the 24th. The bill of lading and invoice were forwarded on the 25th, being the earliest post after the vessel had sailed. It was held that the seller had conformed to the usual practice, and was not *in mora*.

*Cooper v.
Green.*

In *Hesseltines v. Arrol and Co.*⁴ (1802), London dealers on receipt of an order from Edinburgh sent tea to the wharf in London of a shipping company having a number of packets trading between London and Leith. They were told that it would go by the *Kelso* packet, and the invoice

*Hesseltines v.
Arrol and Co.*¹ Mor. 10096.³ Mor. 10100.² Mor. 10098.⁴ Mor. 10111.

Sect. 32.

was so made out, but on making further enquiry in the evening they were then informed that it would go by the *Union* packet. The invoice was altered by deleting *Kelso* and inserting *Union*, and was then forwarded by post to Edinburgh. The tea was actually shipped by the *Kelso* packet, and the vessel having been stranded the greater part was lost and the remainder damaged. It was held that the sellers were not responsible. One of the grounds of judgment was that the buyers might have insured "on ship or ships," and it was considered of importance that they never made any attempt to insure. This judgment was followed in *Elton, Hammond, and Co. v. Porteous and Dewar*¹ (1808), but both cases were doubted and distinguished in *Arnot v. Stewart*² (1813), affirmed in the House of Lords³ (1817). In the last-mentioned case a seller in London shipped goods for Scotland on board a vessel which sailed on 24th February. He forwarded an invoice on 27th February bearing that date, and stating that the goods had been shipped, but without mentioning that the vessel had sailed. The ship having been lost it was held that the risk remained with the seller, although it did not appear that the buyer intended to insure.⁴

*Arnot v.
Stewart.*

*Fleet v.
Morrison.*

The rule was rigidly applied in *Fleet Brothers v. Morrison*⁵ (1854), where the delay of a single day in giving notice of shipment was held to leave the risk of the goods with the seller. It was argued that intimation of the *intention* to ship the goods should have been given in sufficient time to give the buyer an opportunity of insuring from the commencement of the voyage, but the Court did not go this length. Lord Justice-Clerk Hope said: "I am disposed to hold that a letter written and posted on the day the vessel sailed would, in the circumstances, have been timeous intimation."⁶ In reference to the argument that in short coasting voyages it is not usual to insure, Lord Wood

Short voyages.

¹ 13th December 1808, F.C.

² 25th November 1813, F.C.

³ 5 Dow App. Cas. 274; 6 Pat. App. Cas. 289.

⁴ See also *Andrew v. Ross, Park, and Others* (6th December 1810), F.C.; and *Johnston and Sharp v. Baillie* (2nd June 1815), F.C.

⁵ 16 D. 1122.

⁶ 16 D. at p. 1123.

said: "When goods are forwarded by sea by a short coasting voyage, it is peculiarly the positive duty of the seller to give instant notice of the shipment, so that the purchaser may have every possible opportunity of effecting a valid insurance on them if he is so disposed."¹

The case of *Hastie v. Campbell*² (1857) serves further to define the seller's duty, and is interesting because of the disturbing element of the electric telegraph which, while it is available to give earlier notice of despatch, may also prevent insurance by giving earlier intimation of shipwreck. The goods were consigned to Glasgow, and were presented for shipment in a steamer in the Thames about three o'clock on a Saturday afternoon. The barge containing them had, however, to wait its turn, and it was half-past six o'clock before they were taken on board. At this hour the agents' counting-house was closed, the usual trade hours being from 10 A.M. till 6 P.M. The afternoon post for Glasgow closed at six, but a letter could have been posted at the General Post Office—distant $2\frac{1}{4}$ miles from the wharf—up till 7.30 P.M. The next post for Glasgow was before business hours on Monday morning, and therefore notice of the shipment was not despatched till Monday afternoon, arriving on Tuesday morning about the same time as a telegraphic message announcing the loss of the steamer. Out of twenty-four similar shipments on previous occasions, the consignees had only insured one, and that had been done through the agency of the shippers. On these facts two out of three judges held there had been no negligence. The fact that the shippers were agents and not sellers was held to be of no importance, as the duties of each were in this matter identical.³ In reference to a suggestion that the agents ought to have made use of the telegraph, it was held that, in the absence of special instructions, no such duty was incumbent on them. But in their opinions, the judges recognised the fact that the use of the telegraph,

Sect. 32.

Hastie v. Campbell.

Notice by telegraph.

¹ 16 D. at p. 1124.² 19 D. 557.³ "There is no difference between the duty incumbent on an agent, and the duty incumbent on any other shipper of goods."—Per Lord President M'Neill, 19 D. at p. 561.

Sect. 32.

which was then in its infancy, might become essential. "It is a mode of communication," said Lord President McNeill, "which in matters of business, parties will probably be forced to resort to in order to avoid loss, and, once in general use, it may become a matter of duty to employ it."¹

Result of
Scottish
authorities.

From the foregoing review of the Scottish authorities, it will be seen that the seller's duty was fulfilled if he posted *on the day of the shipment*, a notice to the buyer containing the necessary particulars for insurance. The receipt of the notice in ordinary course might not be in time to permit of insurance, at least for the whole period of transit, yet the seller was absolved. The present sub-section seems to impose a heavier duty on the seller. He "must give such notice to the buyer as will *enable him to insure the goods during their sea transit*." This may mean notice before shipment, of intention to ship on a certain day, but, more probably, it will be held to infer a resort to telegraphic communication.

Effect of Act.

Sect. 33.

RISK WHERE
GOODS ARE
DELIVERED AT
DISTANT
PLACE.

33. Where the seller^(a) of goods^(a) agrees to deliver^(a) them at his own risk^(b) at a place other than^(c) that where they are when sold, the buyer^(a) must, nevertheless, unless otherwise agreed,^(d) take any risk of deterioration in the goods necessarily incident to the course of transit.^(e)

NOTES.

(a) "Seller," "buyer" "goods," "delivery." Defined Sect. 62 (1).

(b) "Risk." The section refers to "*specific*" goods, in regard to which the property and the risk usually pass when the contract is made (Sect. 18, Rule 1 and Sect 20).

¹ 19 D. at p. 563. Lord Curriehill to the same effect says: "The inability of the consignees to effect insurance arose from the disturbing element of a natural agency which has lately been made available for the transmission of intelligence, but which, although it may probably be destined ere long to produce a great revolution in rules for transacting mercantile business, has not yet been recognised to this effect."—19 D. at p. 565. As to responsibility for errors in the transmission of telegrams, see *Verdin Brothers v. Robertson* (1871), 10 Macp. 35; *J. and A. Brown v. Law* [1894], 72 L.T. N.S. 185; *Affid. H.L.* [1895], 11 Times Law Rep. 395.

(c) "*Place other than.*" The usual place of delivery is the seller's place of business or residence, or the place where the goods are when sold [Sect. 29 (1)]. Here, the seller has agreed to deliver them elsewhere. **Sect. 33.**

(d) "*Unless otherwise agreed.*" As to express agreement, etc., see Sect. 55.

(e) "*Transit.*" For its duration, see Sect. 45.

COMMENTARY.

The rule here stated forms one of the subsidiary changes introduced by the Act into the law of Scotland. The former law is thus stated by Bell: "Where the bargain is to deliver the commodity at a particular place, the risk is with the seller till delivery at that place, so that if it perish on the voyage it is lost to the seller, and he cannot claim for the price."¹ The Scottish rule did not admit of the exception set forth in this section.

Change in law of Scotland.

In England, and now also in Scotland, the general risk of transit depends upon the passing of the property, which may or may not be coincident with delivery. If the rule of this section is a legal effect of the want of delivery, it is clearly exceptional in cases where the property has passed, but it may perhaps be taken as a qualification of warranty, rather than of risk.² A dealer who sells goods by description warrants them to be of merchantable quality [Sect. 14 (2)], and as this warranty can only be applied when the goods are actually *received* by the buyer, it follows that the seller is responsible for any extraordinary or unusual deterioration in the course of the transit. But, in accordance with the section, if the deterioration is necessarily incident to the course of transit, the seller is not liable,

Exception to general law of risk.

¹ Bell's *Com.* i. 474. See *Spence v. Ormiston* (1687), Mor. 3153; *Milne and Co. v. Miller* (1st February 1809), F.C.; *Henckell Du Buisson and Co. v. Swan and Co.* (1889), 17 Ret. 252.

² In *Beer v. Walker* (1877), 46 L.J. C.P. 677, the property and general risk must be held to have passed to the buyer at the commencement of the transit, yet loss through deterioration in transit fell upon the seller. The goods were rabbits,—sound when delivered to a railway company in London, but unmerchantable when they reached the buyer, a retail dealer in Brighton. If the circumstances fail to be governed by this section the judgment seems to be overruled; but the case may be explained as an instance of a *condition of merchantable quality on arrival* [Sect. 14 (2)].

Sect. 33.*Bull v.
Robison.*

and the implied warranty is therefore narrowed to this extent. The law of the section is founded on *Bull v. Robison*¹ (1854), where Alderson, B., says: "A manufacturer who contracts to deliver a manufactured article at a distant place must indeed stand the risk of any extraordinary or unusual deterioration, but the vendee is bound to accept the article if only deteriorated to the extent that it is necessarily subject to, in its course of transit from the one place to the other."²

Double enquiry as to facts.

The rule of the section is perhaps open to the objection that it may involve an enquiry as to the state of the goods at both ends of the transit.³

Sect. 34.BUYER'S
RIGHT OF
EXAMINING
THE GOODS.

34.—(1.) Where goods^(a) are delivered to the buyer,^(a) which he has not previously examined,^(b) he is not deemed to have accepted^(c) them unless and until he has had a reasonable opportunity^(d) of examining them for the purpose of ascertaining whether they are in conformity with the contract.^(e)

(2.) Unless otherwise agreed,^(f) when the seller^(a) tenders delivery^(a) of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity^(d) of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.^(e)

NOTES.

(a) "Goods," "delivery," "seller," "buyer." Defined Sect. 62 (1).

(b) "Not previously examined." The delivery may be under (1) a "sale," or (2) an "agreement to sell" [Sect. 1 (3)]. In either case the goods may be bought by description, i.e. they

¹ 10 Ex. 324.

² 10 Ex. at p. 346. The seller need not now be a manufacturer if he is a dealer. See Sect. 14 (2).

³ As in *Dixon, Ltd. v. Jones, etc.* (1884), 11 Ret. 739, where it was held that inferiority of quality on arrival at a home port is not conclusive of their condition at a foreign port, where by contract they were to be delivered.

may be represented in the contract by written or spoken language, or they may be bought by means of that special kind of description called "sample." There is also a third alternative: they may be defined by being pointed out to the buyer in bulk, either with or without a sample. Where they are bought by "description" from a dealer there is an implied warranty of merchantable quality [Sect. 14 (2)], but this again is subject to the qualification that if the buyer has examined the goods and the examination ought to have revealed the defect, there is no warranty [Sect. 14 (2)]. The provision of the present section differs from the qualification referred to, in so far as it implies a *duty* of examination before acceptance, while Sect. 14 only provides for the case of *actual* examination. Where under Sect. 14 the buyer accepts the goods without examination, it appears to be still within his power, at any time, to found upon a breach of warranty. Where goods are bought by sample, the provision of this section as to "reasonable opportunity" is also practically contained in Sect. 15 (2) (b), and the implied condition that the goods are "free from any defect, rendering them unmerchantable," is qualified by the further provision that the defect must be such as "would not be apparent on *reasonable examination* of the sample" [Sect. 15 (2) (c)]. Where the goods are defined for the purposes of the contract, by being pointed out in bulk to the buyer, there may nevertheless be an express or implied term of the contract, conformity with which can only be ascertained by an examination on delivery, or before acceptance, in terms of the present section.

(c) "*Not deemed to have accepted.*" Acceptance implies such conduct on the part of the buyer as will preclude him from afterwards rejecting the goods as disconform to contract. Where it follows upon an "agreement to sell" [Sect. 1 (3)], it is practically the buyer's assent to the seller's appropriation of the goods to the contract (Sect. 18, Rule 5). It is to be distinguished from "*receipt*," and also from "*acceptance*" in the sense of Sect. 4. See COM., Sect. 35 *post*, p. 169. The equity of the rule is obvious. A buyer "cannot be said to accept that he knows nothing of, otherwise it would make him the acceptor of whatever the vendor chose to send him; whereas he has a right to see whether, in his judgment, the goods sent correspond with the order."¹

(d) "*Reasonable opportunity.*" See note (b) *supra*. Reasonable opportunity, like "reasonable time" (Sect. 56), is a question of

¹ Per Alderson, B., in *Hunt v. Hecht* (1853), 8 Ex. 814 at p. 817. See also *Ishervood v. Whitmore* (1843), 11 M. & W. 347.—Per Parke, B., at p. 350, quoted *post*, p. 170, note.

Sect. 34.

fact. What is reasonable depends on the circumstances of each case. Thus it may be necessary to make the examination at the time and place of delivery,¹ or at some other time or place contemplated by the contract, either before or after delivery.²

(e) "*Conformity with the contract.*" "Contract of sale includes an agreement to sell as well as a sale" [Sect. 62 (1)]. See also Sect. 1 (3).

(f) "*Unless otherwise agreed.*" See Sect. 55.

Sect. 35.**ACCEPTANCE.**

35. The buyer^(a) is deemed to have accepted^(b) the goods^(a) when he intimates to the seller^(c) that he has accepted them, or when the goods have been delivered^(a) to him, and he does any act in relation to them which is inconsistent with the ownership^(d) of the seller,^(a) or when after the lapse of a reasonable time,^(e) he retains the goods without intimating to the seller^(c) that he has rejected them.

NOTES.

(a) "*Seller,*" "*buyer,*" "*goods,*" "*delivery.*" Defined Sect. 62 (1).

(b) "*Accepted.*" See note (c), Sect. 34 *ante*, p. 167, and *COM. infra*, p. 169.

(c) "*Intimates*" to the seller. It will be observed that out of three modes of acceptance, two depend on express notice to the seller. The third is any act on the part of the buyer inconsistent with the seller's ownership.

(d) "*Inconsistent with the ownership.*" Breaking bulk to a reasonable extent, or even a certain amount of use, is not necessarily inconsistent with the seller's ownership, provided the goods are of such a nature that disconformity to contract cannot be otherwise discovered.³ *COM. infra*, p. 170.

(e) "*Reasonable time* is a question of fact." Sect. 56.

¹ *Perkins v. Bell* (1892), 62 L.J. Q.B. 91.

² *Lorymer v. Smith* (1822), 1 B. & C. 1; *Heilbutt v. Hickson* (1872), L.R. 7 C.P. 438; *Grimoldby v. Wells* (1875), L.R. 10 C.P. 391. "If the time of inspection as agreed on, be subsequent to the time agreed for the delivery of the goods, or if the place of inspection as agreed upon, be different from the place of delivery, the purchaser may, upon inspection at such time and place, . . . return them, then and there, on the hands of the seller."—Per Brett, J., in *Heilbutt v. Hickson*, L.R. 7 C.P. at p. 456.

³ *Wallace v. Robinson and Co.* (1886), 22 S.L.R. 830. See also *Lucy v. Moufflet* (1860), 5 H. & N. 229.

COMMENTARY.

Sect. 35.

"Acceptance" here, and in Sect. 34, has a different meaning from "acceptance" in Sect. 4, which is technical, and does not apply to Scotland. In England goods might be accepted so as to elide Sect. 17 of the Statute of Frauds,¹ and thus form a binding verbal contract for the sale of goods of the value of £10 or upwards; yet they might not be accepted as *performance* of the contract. In *Morton v. Tibbett*² (1850), Lord Campbell, in delivering the judgment of the Court, said: "We are of opinion that there may be an acceptance and receipt within the meaning of the Statute of Frauds, without the buyer himself having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract. The acceptance to let in parol evidence of the contract, appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled."³

Meaning of
"acceptance."

Again, "acceptance" must be distinguished from mere receipt. "When goods are sent to a buyer in performance of the vendor's contract, the buyer is not precluded from objecting to them by merely *receiving* them, for receipt is one thing and acceptance another. But receipt will become acceptance if the right of rejection is not exercised within a reasonable time, or if any act be done by the buyer which he would have no right to do unless he were the owner of the goods."⁴ Goods may be received by a carrier on behalf of the buyer, but it is obvious that a carrier cannot take upon himself the responsibility of accepting them, so as to preclude

Distinguished
from "re-
ceipt."

Receipt by
carrier.

¹ Repealed by this Act, but re-enacted by Sect. 4.

² 19 L.J. Q.B. 382, and 15 Q.B. 428.

³ 19 L.J. Q.B. at p. 385. This judgment was afterwards doubted, but, still later, it was approved, and the law is now established. "There must be an acceptance and an actual receipt; no absolute acceptance, but an acceptance which could not have been made, except on admission of the contract, and that the goods were sent under it. I am of opinion there was a sufficient acceptance under the Statute of Frauds, although there was (still) a power of rejection."—Per Brett, L.J., in *Kibble v. Gough* (1878), 38 L.T. N.S. 204 at p. 206. See also Blackburn, part i. chap. 2; Benjamin, book i. chap. 4.

⁴ Benjamin, p. 711. See *Abbott v. Wolsey* (1895), 11 Times Law Rep. 414, where the buyer having examined the goods and taken a sample was held to have accepted them in terms of Sect. 4 (3).

Sect. 35.

Examination
before accept-
ance.

the buyer from objecting that they are not conform to contract. So also the buyer himself is entitled, before acceptance, to "a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."¹ He is not bound to accept goods tendered to him in closed casks which he is not allowed to open,² nor to attend at a particular place after sunset,³ nor to select the contract goods out of a larger quantity or a mixed lot sent him by the seller.⁴

Wallace v.
Robinson.

The case of *Wallace and Brown v. Robinson, Fleming, and Co.*⁵ (1885) illustrates the extent and limits of the buyer's duty of giving notice of rejection, and also the effect of breaking bulk as an act inconsistent with the ownership of the seller. The goods consisted of a cargo of 615 logs of wood consigned by the seller in Dantzic to the buyers in Arbroath. The ship arrived on 14th June, and the discharge was completed on 26th June. While the ship was discharging, the buyer sold 11 logs from the ship's side, but these being used for a special purpose for which they were suited, disconformity to contract was not then discovered. He subsequently cut up in his yard 13 other logs to fulfil an order, and finding them disconform to contract, he caused a large number more to be chipped in order to ascertain their condition. On 3rd July he wrote to the seller's agents in London rejecting the cargo. The disconformity to contract was admitted, but it was urged that the buyer's notice of rejection was not timeous, and that by cutting up part of the cargo and selling another part, he had broken bulk, and was thus, at the date of the notice of rejection,

¹ Sect. 34.

² "A tender of goods does not mean a delivery or offer of packages containing them, but an offer of those packages under such circumstances that the person who is to pay for the goods shall have an opportunity afforded him, before he is called on to part with his money, of seeing that those presented for his acceptance are in reality those for which he has bargained."—Per Parke, B., in *Isherwood v. Whitmore* (1843), 11 M. & W. 347 at p. 350.

³ "Where a thing is to be done *anywhere*, a tender at a convenient time before midnight is sufficient; where the thing is to be done at a *particular place*, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight and a convenient time before sunset."—Per Parke, B., in *Startup v. Macdonald* (1843), 6 M. & G. 593 at p. 623.

⁴ Sect. 30.

⁵ 22 S.L.R. 830.

unable to restore the cargo *in forma specifica*. The Court unanimously repelled both pleas.¹ **Sect. 35.**

There is at least an analogy between the conditions which qualify acceptance as set forth in this section, and the conditions attached to the buyer's right of rejection in Scotland reserved by Sects. 11 (2) and 53 (5). But Lord Chelmsford points out a distinction between the law of England and Scotland in regard to acceptance and non-acceptance (rejection), which is of some importance in this connection. "In England if goods are sold by sample,² and they are delivered and *accepted* by the purchaser, the purchaser cannot return them; but if he has not completely accepted them, that is, if he has taken the delivery *conditionally*, he has a right to keep the goods a sufficient time to enable him to give them a fair trial, and then, if they are found not to correspond with the sample, he is entitled to return them. As I understand the law of Scotland, although the goods have been accepted by the purchaser, yet if he finds that they do not correspond with the sample, he has *an absolute right* to return them."³

Negation of duty of acceptance equals right of rejection.

Suggested distinction between law of England and Scotland.

Although delivery and acceptance are concurrent conditions, the buyer is entitled to retain the goods for a reasonable time *after* delivery to ascertain whether they are in conformity with the contract (Sect. 34). This is a conditional acceptance in terms of Lord Chelmsford's *dictum*, and it was also a condition attaching to acceptance according to the former law of Scotland, so that perhaps the suggested distinction between the laws of the two countries is more theoretical than real.

¹ Lord Trayner (Ordinary) said: "I regard this as timeous rejection. A purchaser is entitled to a reasonable time to examine the goods delivered to him, and in this case I cannot see that there was any unreasonable delay. In regard to the other plea, I do not think there was breaking of bulk in the legal sense so as to bar objection, nor was there any act of ownership of the kind which would bar rejection, if rejection was otherwise warranted. . . . I think the buyers were entitled to rely upon the goods delivered to them being conform to contract, and to proceed to cut them up to fulfil the order they had"—22 S.L.R. at p. 832.

² The case under consideration was one of sale by sample, but the principle applies equally to any executory sale.

³ In *Couston, Thomson, and Co. v. Chapman* (1872), 10 Macp. H.L. 74 at p. 80.

Sect. 35.
Timeous
notice.

The intimation to the seller of the buyer's intention to reject must be given within a reasonable time. It is to be observed that Sect. 11 (2), while providing for rejection within a "reasonable time," is silent as to notice to the seller, but as the circumstances are the same in each case, the enactment of this section will form a supplement to the other provision.¹

Sect. 36.
BUYER NOT
BOUND TO
RETURN RE-
JECTED GOODS.

36. Unless otherwise agreed,^(a) where goods are delivered^(b) to the buyer,^(c) and he refuses to accept^(d) them, having the right so to do,^(e) he is not bound to return them to the seller,^(c) but it is sufficient if he intimates to the seller^(f) that he refuses to accept^(d) them.

NOTES.

(a) "*Unless otherwise agreed.*" As to express agreement, see Sect. 55.

(b) "*Delivery.*" Defined Sect. 62 (1). Rules as to delivery, Sect. 29.

(c) "*Seller,*" "*buyer.*" Defined Sect. 62 (1).

(d) "*Refuses to accept.*" In other words, "*rejects,*" e.g. under Sect. 11 (2). See also Sect. 35, and COM. *ante*, p. 171.

(e) "*Having the right so to do.*" As where the seller is in breach of contract [Sect. 11 (2)]. If the rejection is wrongful, the buyer has not only no duty, but has no right to return the goods.

(f) "*Intimates to the seller.*" No formal notice is necessary. Any unequivocal act of the buyer signifying rejection, and made known to the seller, will be sufficient.² But the notice of rejection, if not accompanied by an offer to return, must not be inconsistent with such an offer. Thus notice of rejection, accompanied by an intimation that the seller will not be allowed to remove the goods till they are replaced by others, will not be effectual.³ Nor will notice of rejection serve its purpose if the buyer does not continue to act as a mere custodian. Where,

¹ As to what constitutes timeous notice see COM., Sect. 11 *ante*, p. 54, and NOTE (f), Sect. 36.

² *Grimoldby v. Wells* (1875), L.R. 10 C.P. 391.—Per Brett, J., at p. 395. See COM. *infra*, p. 173.

³ *Jardine v. Pendreigh* (1869), 6 S.L.R. 272.

e.g., after intimation and actual storage of the goods, the buyer takes part of them out of the warehouse and sells or consumes them, he will be held liable for the price of the whole.¹ **Sect. 36.**

COMMENTARY.

The former law of Scotland on the subject of this section was not well defined, but its tendency was to impose a duty upon the buyer of returning rejected goods to the seller, or at least of offering to return them.² In many cases, however, the word "return" meant no more than notice to the seller that the goods were rejected, and an intimation, express or implied, that they lay at his disposal. The Institutional writers state that the goods must be "*offered back*,"³ but do not suggest any further active steps on the part of the buyer. Bell, after stating that the buyer must make his challenge instantly, proceeds to say that "where goods are rejected at a distance from the seller's residence, and where he has no agent, the buyer must act fairly for the seller's interest on the principles of *negotiorum gestio*."⁴ This is simply another mode of stating that the buyer acts as an involuntary bailee or custodian for the seller, as under the present section.⁵ M. P. Brown says that "the thing sold must be *returned* in due time by the vendee,"⁶ but this may be taken to be a loose expression, implying notice to the seller that the goods are his, and that he will receive them on application.⁷

Former law of Scotland.

On the other hand, a rule has been laid down, especially in sales of horses, that the buyer's duty does not end with mere notice. In *M'Bey v. Gardiner*⁸ (1858), Lord Cowan

Neutral custody.

¹ *Robb v. Cruikshank* (1840), 2 D. 988; *Ranson v. Mitchell* (1845), 7 D. 813.

² See, *e.g.*, *Webster v. Thomson* (1830), 8 Sh. 528.

³ *Stair*, i. 10. 15; *Ersk.* iii. 8. 10; *Bank*, i. 19. 2.

⁴ *Bell's Com.* i. 464; *Prin.*, Sect. 99.

⁵ As to the risk in such a case see Sect. 20.

⁶ M. P. Brown on *Sale*, p. 309.

⁷ "The right of the seller is, that if the goods when tendered are not taken in implement of the contract, they remain the property of the seller, must be at his command and disposal, and so must be instantly sent back or held only for him."—Per Lord Justice-Clerk Hope in *Padgett v. M'Nair* (1852), 15 D. 76 at p. 79. See also *Jowitt v. Stead* (1860), 22 D. 1400.

⁸ 20 D. 1151.

Sect. 36.

stated the rule thus: "The pursuer contends that having given notice of the unsoundness and of his intention to return the horse, he had no duty beyond keeping it properly. . . . But, when the purchaser has given notice, and the seller has denied the existence of the alleged unsoundness and refused to take back the animal, it appears to me to be the duty of the purchaser to place it in neutral custody until the authority of the Court is obtained for its sale."¹ Judgment was given against the buyer on the ground that, although he had given timeous notice, he had not placed the horse in neutral custody, and had allowed nearly two months to elapse before he applied for a judicial warrant to sell. In *Caledonian Ry. Co. v. Rankin*² (1882), Lord Justice-Clerk Moncreiff said: "When a purchaser holds that an article is disconform to warranty, or is not the article which he was led to believe it to be, he is bound, instead of keeping it in his own custody, to put it into neutral custody if the seller refuses to take it back; for he is bound to tender it back, and if the seller refuses to take it, he is not entitled to expose it to any risk which it might suffer in his custody."³ Lord Young, in the same case, took a less extreme view. He said: "The matter of neutral custody is itself one of circumstances. . . . So far as the character or class of the goods is concerned, neutral custody would not be required in the case of plate, pictures, or books. It might be in the case of wine, but on the whole it is a question of circumstances, more having to be regarded than merely the nature of the article."⁴ In this case, although a horse had been kept by the buyer for six weeks after notice of rejection, during which time correspondence and negotiations had been going on between the parties, the buyer was held not to have neglected any duty.⁵

The most authoritative utterance in the law of Scotland on the subject of the buyer's duty, is the House of Lords

¹ 20 D. at p. 1153. As to the supposed necessity for obtaining judicial sanction to the sale see COM., Sect. 37 *post*, p. 178.

² 10 Ret. 63.

³ 10 Ret. at p. 65.

⁴ 10 Ret. at p. 67.

⁵ The result of the judgment in *Robson v. Thomson* (1864), 2 Macp. 598, so far as regards the question of neutral custody, was to the same effect.

judgment in *Couston, Thomson, and Co. v. Chapman*¹ (1872), **Sect. 36.** where the buyer was held to have lost his right to reject, by delaying any offer of return until litigation had commenced. It will be observed that in this case there is no reference to any obligation on the part of the buyer to place the goods in neutral custody, or to apply for a judicial warrant to sell. On the question of the supposed obligation to return the goods to the seller, Lord Chelmsford says: "Where a party desires to rescind a purchase upon the ground that the quality of the article sold does not correspond with that which it professes to be or with the sample upon which it was sold, it is his duty to make a clear and distinct offer to return, or in fact to return the goods, by stating to the vendor that the goods are at his risk, that they no longer belong to the purchaser, that he rejects them, that he throws them back upon the vendor's hands, and that the contract is thereby rescinded."² In the subsequent English case, *Grimoldby v. Wells*³ (1875), the Court explained Lord Chelmsford's meaning in the above-cited passage to be, not that the buyer was bound to return, or to offer to return, the goods, but that he might have effectually declared his intention of rejecting them in either of these ways. In the case last referred to, Brett, J., stated the law of England thus: "The buyer may, in fact, return the goods, or offer to return them, but it is sufficient, and the more usual course is, to signify his rejection of them by stating that the goods are not according to contract, and that they are at the vendor's risk. No particular form is essential; it is sufficient if he does any unequivocal act showing that he rejects them"⁴

English law as to rejection.

Any doubt as to the buyer's duty in regard to rejected goods seems removed by the terms of the section. If the seller chooses to disregard the intimation of rejection, and such rejection is justified, the property and the risk remain with him, subject, however, to the buyer's duty as custodian in terms of Sect. 20. It is clear, therefore, that it is no part of the buyer's duty to place the goods in neutral custody.

Effect of the section.

¹ 10 Macp. H.L. 74. ² 10 Macp. H.L. at p. 81. ³ L.R. 10 C.P. 391.

⁴ L.R. 10 C.P. at p. 395. See also *Lucy v. Mowfllet* (1860), 5 H. & N. 229; *Heilbutt v. Hickson* (1872), L.R. 7 C.P. 438.

Sect. 36.

If the buyer rightly rejects goods, but continues to take the care and custody of them on behalf of the seller, he will, no doubt, be entitled to make a reasonable charge similar to that allowed to the seller upon the buyer's default in terms of the immediately succeeding section.¹

Sect. 37.

LIABILITY OF
BUYER FOR
NEGLECTING
OR REFUSING
DELIVERY OF
GOODS.

37. When the seller^(a) is ready and willing to deliver the goods,^(a) and requests the buyer^(a) to take delivery,^(a) and the buyer does not within a reasonable time^(b) after such request take delivery of the goods, he is liable to the seller for any loss^(c) occasioned by his neglect or refusal to take delivery,^(d) and also for a reasonable charge for the care and custody^(e) of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.^(f)

NOTES.

(a) "*Seller*," "*buyer*," "*goods*," "*delivery*." Defined Sect. 62 (1).

(b) "*A 'reasonable time' is a question of fact.*" Sect. 56. The seller is also allowed a reasonable time for giving delivery.²

(c) *Loss through buyer's neglect or refusal.* This will include the accidental loss of the goods themselves. The delivery has been delayed through the "*fault*"³ of the buyer, and therefore the goods are at his risk. Sect. 20.

(d) "*Take delivery.*" "It is the duty of the seller to *deliver* the goods" (Sect. 27). The corresponding duty of the buyer is to "*accept*" the goods (Sect. 27), which necessarily includes taking delivery.

(e) "*Care and custody.*" As bailee or custodian of the goods of the other party. (See Sect. 20). There is no express provision for the corresponding case of goods properly rejected by the

¹ Sect. 37.

² See *Forbes v. Campbell* (1885), 12 Ret. 1265.

³ "*Fault*" defined Sect. 62 (1).

buyer, and kept by him for the seller, but a right to make a reasonable charge is no doubt implied. See COM., Sect. 36 *ante*, p. 176. The right of the seller here expressed is personal, and the remedy seems to fall under Sect. 57 rather than under Sect. 50 (1). **Sect. 37.**

(f) "*Repudiation of the contract.*" Sect. 11 (2) gives the buyer a right to repudiate in the event of a breach of contract by the seller. This proviso reserves the seller's rights in the event of the repudiation being unwarranted.

COMMENTARY.

Under this section, the buyer in default is liable to the seller (1) for actual loss sustained, (2) for a reasonable charge for care and custody.

Reimbursement of the loss sustained follows naturally from a breach of the buyer's duty as set forth in Sect. 27.¹ The law of Scotland before the Act did not differ in this respect from that of England. **Reimbursement of loss.**

The seller's rights and duties as custodian of the goods depended, prior to the Act, upon a different principle in Scotland from that recognised in England. In Scotland, where the seller sued for the price, it was a condition of his right that he was able to give delivery of the goods in such a state as to be fulfilment of the contract. Careful custody was therefore necessary to preserve his claim if he chose to put it in that form. On the other hand, the goods were his own so long as he held possession, and, if he adopted the alternative of re-selling and claiming damages, the buyer could interpose no right of property, or in any way restrain his action as proprietor. But in England the seller's duty as to custody differed according as the property had, or had not, passed to the buyer. In the latter case, the seller could only sue for the price in certain exceptional circumstances,² and his duty, therefore, was not custody for the purpose of being enabled to fulfil the counterpart of the obligation, but judicious re-sale if that was possible, and if not, then such other disposal of the goods as would minimise his claim of **Charge for care and custody.—Former law of Scotland.**

English law.

¹ Such loss may be recovered as damages under Sect. 50 (1).

² See Sect. 49 (2) of the Act.

Sect. 37.

Divergent
principles,
but practice
similar.

damages. If, again, the property had passed, the seller held possession as involuntary bailee or custodian of the goods of another (viz. the buyer), and his duty did not extend beyond ordinary diligence for safe keeping. These divergent principles did not, however, lead to any essential difference in practice. It may be said that in Scotland before the Act, neutral custody of the goods was insisted upon, and that a judicial warrant for re-sale was by some text-writers deemed essential or at least highly expedient. It may, however, be doubted if these requirements really formed part of the law of Scotland. They seem alien to the Scottish principle of continued ownership in the seller, and though they were much more closely allied to the English principle of passed property they had no counterpart in English practice.¹ There is no clear authority even under the former law of Scotland for the course suggested by Bell² of applying for judicial authority to sell, or for imposing a penalty on a party selling without judicial sanction.³ The subject of neutral custody has already been discussed. COM., Sect. 36 *ante*, p. 173.

Remuneration
for care and
custody.

The general rule of the section as to remuneration for care and custody was adopted in the common law of Scotland chiefly on English authority. "If," says M. P. Brown, "the vendee fails to take away the thing sold in due time, he will be liable to the vendor for warehouse rent or other expenses attending the keeping of it."⁴ The authority

¹ "If the defendant intended to repudiate the contract he ought to have given the plaintiff distinct notice at once that he repudiated the goods, and that, on such a day, he would sell them by such a person, for the benefit of the plaintiffs. The plaintiffs could then have called on the auctioneer for the proceeds of the sale."—Per Lord Abinger in *Chapman v. Morton* (1848), 11 M. & W. 584 at p. 539.

² Bell on *Sale*, p. 109.

³ In *Gardiner v. McLeavy* (1880), 7 Ret. 612, the interlocutor of Court expressly bore that the buyer "was entitled, *after notice*, to sell." There was no suggestion of a judicial warrant being required, though in point of fact one had been obtained in the Sheriff Court from which the case came on appeal.

⁴ M. P. Brown on *Sale*, p. 354; see also p. 347. Pothier makes a similar statement: "C'est une des obligations qui naissent de la nature du contrat, que celle que contracte l'acheteur d'enlever les marchandises qui lui ont été vendues. Lorsque, par une sommation judiciaire, il a été mis en demeure de satisfaire à cette obligation, il est tenu des dommages et intérêts que le vendeur a soufferts depuis la sommation, par la privation de l'usage de

cited is the English case *Greaves v. Ashlin*¹ (1813), where **Sect. 37.** Lord Ellenborough said: "If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse room; or he may bring an action for not removing them should he be prejudiced by the delay."² The law of Scotland is now, by the Act, assimilated to that of England.

In the circumstances of this section the property will in most cases be held to have passed to the buyer,³ and therefore, the seller's duty as custodier will be much the same as that of the buyer under Sect. 36.

ses magasins, greniers, caves et celliers qu'occupaient les marchandises vendues."—*Vente*, 290. The rule was followed in the Sheriff Court case—*Wilson, Ronald, and Co. v. Curle, Robertson, and Co.* (1884), Guthrie's Sel Cas. 2nd ser. 506. ¹ 3 Camp. 426.

² Bell makes a similar statement as to the law of Scotland, and also founds on *Greaves v. Ashlin* (*Sale*, p. 109).

³ At least the risk has passed under Sect. 20.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

Sect. 38.
UNPAID
SELLER
DEFINED.

38.—(1.) The seller^(a) of goods is deemed to be an “unpaid seller” within the meaning of this Act—

(a.) When the whole of the price^(b) has not been paid or tendered^(c);

(b.) When a bill of exchange or other negotiable instrument^(d) has been received as conditional payment,^(e) and the condition on which it was received has not been fulfilled by reason of the dishonour^(f) of the instrument or otherwise.^(g)

(2.) In this part of this Act the term “seller”^(a) includes any person who is in the position of a seller, as, for instance, an agent of the seller^(b) to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

NOTES.

(a) “*Seller.*” Defined Sect. 62 (1). By the present section the usual definition is extended as regards Part IV. of the Act, so as to include persons in the position of a seller.

(b) "*Whole price.*" As to price generally, see Sects. 8 and 9. Sect. 38. A partial payment of the price has no effect on the seller's rights against the goods.

(c) "*Paid or tendered.*" See as to legal tender COM., Sect. 8 *ante*, p. 41.

(d) "*Negotiable instrument*" for the purpose of payment must be either a bill, a promissory note, or a cheque. As to negotiation of these instruments see Bills of Exchange Act 1882,¹ Sects. 31, 89, and 73. Bills of lading at common law and under the Bills of Lading Act 1855,² and "documents of title" under the Factors Act 1889³ are to a certain extent negotiable, but the nature of these documents precludes their use as a form of payment. See COM., Sect. 25 *ante*, p. 126.

(e) "*Conditional payment.*" At common law payment by bill is only conditional payment, unless where there is novation. If the bill is not paid at maturity it does not operate as a discharge of the counter obligation in the contract.⁴ In construing the terms of a deed or instrument, the word "payment" is not always equivalent to "payment in satisfaction and discharge."⁵ In other words, the payment may be conditional, as in the case supposed of a bill afterwards dishonoured.⁶

(f) "*Dishonour*" of bill. See Bills of Exchange Act 1882,⁷ Sect. 47.

(g) "*Or otherwise.*" The non-fulfilment of the condition may arise from the buyer's insolvency during the currency of the bill, and before actual dishonour.

(h) "*Agent of the seller.*" The general law of principal and agent is reserved by Sect. 61 (2). The sub-section specifies two kinds of agents, viz. (1) an agent holding an indorsed bill of lading,⁸ and (2) an agent paying, or making himself directly

¹ 45 & 46 Vict. c. 61.

² 18 & 19 Vict. c. 111.

³ 52 & 53 Vict. c. 45.

⁴ *Anderson v. M'Dowal* (1865), 3 Macp. 727.

⁵ Per Tindal, C. J., in *Maillard v. The Duke of Argyll* (1843), 6 M. & G. 40. But see *Purnell v. Shannon* (1894), 22 Ret. 74, especially opinion of Lord Adam at p. 78.

⁶ "The law is clear that if in payment of a debt the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on his original debt until such bill or note becomes payable and default is made in the payment; but if such bill or note is of no value, as if, for example, drawn on a person who has no effects of the drawer in his hands, and who therefore refuses to accept it, in such a case he may consider it as waste-paper, and resort to his original demand and sue the debtor."—Per Lord Kenyon in *Stedman v. Gooch* (1793), 1 Esp. 5.

⁷ 45 & 46 Vict. c. 61.

⁸ The case of an agent, who is also indorsee of a bill of lading, receives illustration from *Morison v. Gray* (1824), 2 Bing. 260, and also from Sect. 1 of the Bills of Lading Act 1855 (18 & 19 Vict. c. 111).

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responsible for, the price. But these are not meant to exhaust the cases of persons in the position of a seller, *e.g.* a principal consigning goods to a factor.¹

COMMENTARY.

Part IV. of the Act (commencing with this section) sets forth certain exceptions to the rule that the buyer's right to the *possession* of the goods follows his right of property in them. These exceptions are based upon a breach by the buyer of his obligation to pay the price, and accordingly this section is devoted to a definition of an "unpaid seller."

Effect of first sub-section.

The effect of the first sub-section is that neither a partial payment, nor a conditional payment, operates to take the vendor out of the category of an unpaid seller. The whole of the price must be unconditionally paid or tendered.² "When the purchaser becomes insolvent . . . the seller (notwithstanding he may have agreed to allow credit for the goods) is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered."³

Payment by bill, etc.

Payment by bill, note, or cheque may be absolute or conditional. It is absolute where the seller negotiates the bill without rendering himself liable,⁴ and, where the bill is that of some third person, the buyer may be free from further liability on the principle of delegation.⁵ In the case of a third party's bill, if the buyer's name is not attached, the seller must not only prove its dishonour, but he must show that he has used due diligence to obtain pay-

¹ *Kinloch v. Craig* (1790), 3 T.R. 119, 788; *Newsom v. Thornton* (1805), 6 East 17.

² *Melrose v. Hastie* (1851), 13 D. 880, 14 D. 268.

³ Per Mellish, L. J., in *Ex parte Chalmers* (1873), L.R. 8 Ch. App. 289 at p. 291. See Blackburn, p. 326 *et seq.*

⁴ *Bunney v. Poyntz* (1833), 1 B. & Ad. 568.

⁵ Bell's *Prin.* Sect. 577. But see *Anderson v. McDowal* (1865), 3 Macp. 727.

ment and to preserve the buyer's rights against other parties to the instrument.¹ **Sect. 38.**

In the ordinary case, however, and in the absence of any agreement, express or implied, to the contrary, payment by bill is conditional, and the seller's right to the price revives on the bill being dishonoured.² **Usually a conditional payment.**

The second sub-section expresses the rule established in regard to stoppage *in transitu* by *Feise v. Wray*³ (1802). **Sub-sect. (2). *Feise v. Wray.*** The right to stop in transit is not an adjunct of lien, but is a right peculiar to the seller of goods. Hence, although many other persons have liens over goods in their possession, none but a seller can follow the goods of another after the actual custody has been lost. But among sellers are classed consignors and agents in the position of sellers. Thus in *Feise v. Wray*⁴ the right was held to exist in favour of an agent who had bought goods on his own credit, but on the order of a principal to whom he consigned them, and who became bankrupt during the transit.

39.—(1.) Subject to the provisions of this Act,^(a) and of any statute in that behalf,^(b) notwithstanding that the property in the goods may have passed to the buyer,^(c) the unpaid seller^(d) of goods, as such, has by implication of law^(e)— **Sect. 39. UNPAID SELLER'S RIGHTS.**

(a.) A lien^(f) on the goods or right to retain them^(g) for the price^(h) while he is in possession⁽ⁱ⁾ of them ;

¹ *Camidge v. Allenby* (1827), 6 B. & C. 373; *Guardians of Lichfield v. Green* (1857), 1 H. & N. 884; *Smith v. Mercer* (1867), L.R. 3 Ex. 51.

² Benjamin, p. 733. *Gunn v. Bolekow, Vaughan, and Co.* (1875), 10 Ch. App. 491; *Currie v. Misa* (1875), L.R. 10 Ex. 153. "It appears to be settled in England that a cheque or bill accepted, although it be not absolute payment, is conditional payment; the condition being that it shall become absolute payment when honoured, and that, on the other hand, the debt shall revive if the cheque be not honoured. I do not know that that principle has been expressed in any Scotch judgment, but I think that I ought on such a point to follow the English authorities, there being, so far as I know, nothing repugnant in our own decisions."—Per Lord Kincairney (Ordinary) in *Macdougall v. M'Nab* (1898), 21 Ret. 144 at p. 147.

³ 3 East 93.

⁴ *Cit. sup.*

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(b.) In case of the insolvency⁽¹⁾ of the buyer,^(d) a right of stopping the goods in transitu^(k) after he has parted with the possession of them ;

(c.) A right of re-sale as limited by this Act.^(o)

(2.) Where the property in goods has not passed to the buyer,^(m) the unpaid seller⁽ⁿ⁾ has, in addition to his other remedies,^(o) a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.^(p)

NOTES.

(a) There are various modifying provisions in the immediately following sections, *e.g.* Sect. 43, and the proviso attached to Sect. 47.

(b) *E.g.* The Factors Act 1889,¹ particularly Sect. 10, which is reproduced and extended by the proviso attached to Sect. 47 of this Act. See also Bills of Lading Act 1855.²

(c) See Sects. 17 and 18.

(d) "Seller," "buyer." Defined Sect. 62 (1). "Unpaid seller." Defined Sect. 38.

(e) "*Implication of law*" may be negatived or varied by express agreement, course of dealing, or usage. Sect. 55.

(f) "*Lien*." See Sects. 41 to 43.

(g) "*Right to retain them*." See note (o) *infra* and COM. *infra*, p. 186.

(h) "*Price*." See Sects. 8 and 9.

(i) "*Possession*," is not defined in this Act, but see Factors Act 1889, Sect. 1 (2).³ As between vendor and vendee the word possession "is used in a narrower and more restricted sense than in the general technical and legal import of the word, and yet in a more extended sense than its popular meaning. For in general, in technical language, one is said to be possessed of goods when he has the property, and an immediate right to

¹ 52 & 53 Vict. c. 45. Text in Appendix I. *post*, p. 296.

² 18 & 19 Vict. c. 111. Text in Appendix I. *post*, p. 293.

³ Text in Appendix I. *post*, p. 297.

have the goods dealt with as he will; yet, a purchaser on credit of a specific chattel, who has the property, and whilst solvent, the right to deal with the goods as he will, though they remain in the vendor's hands, and who, therefore, in general legal language, may be called possessed of them, has never had such possession as will determine the vendor's rights in case the purchaser becomes insolvent. And yet, circumstances far short of an actual delivery into the hands of the purchaser, amount to such a constructive possession as is sufficient to render the purchaser's property indefeasible."¹

(j) "*Insolvency*." See Sect. 62 (3).

(k) "*Stoppage in transitu*." See Sects. 44 to 46.

(l) "*Re-sale*" and its limitations. See Sects. 47 and 48.

(m) "*Property not passed*." See Sect. 18, Rules 2 to 5.

(n) "*Unpaid seller*." See Sect. 38.

(o) "*In addition to his other remedies*." Where the property has not passed "the owner may in defiance of his contract, sell to some third person and give him a perfectly good title."² This right is more extensive than the right of re-sale provided by this section, and expanded by Sects. 47 and 48, and it is therefore one of the "*other remedies*" here reserved. The seller's right where the property has not passed, is exactly the same as the right of "*retention*" formerly existing in Scotland in all cases before delivery. It is only where the property has not passed that the word "*retention*" can still be properly applied in Scotland. Where the property has passed, the seller can have no more than a "*lien*" as in England. See *COM. infra*, p. 186.

(p) "*Coextensive with his rights of lien and stoppage in transitu*." But the seller, in the circumstances supposed, has also a more extensive right. See note (o) *supra*. It is clear that the seller can withhold delivery although the buyer is solvent, if he is in default. Further, his power to retain is not confined to the price merely, as in a case where the property has passed. He can refuse to deliver so long as *any debt* is due to him by the buyer.

COMMENTARY.

This section states generally the three rights of the seller against the goods, viz. lien, stoppage *in transitu*, and re-sale. Each of these is expanded in the following sections.

¹ Blackburn on *Sale*, pp. 333, 334.

² Blackburn on *Sale*, p. 244.

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"Right to retain."
Misapplication of word
"retention."

The words "*or right to retain*" were introduced at an early stage of the adaptation of the Bill to Scotland, but they seem unnecessary, and may possibly lead to misapprehension.

In Scots law, "retention" has long been applied to the right of an owner of moveable property to retain it, notwithstanding a personal obligation to transfer to another. Retention is, in substance, the right of the undivested owner to refuse implement of his contract until the counterpart is fulfilled,¹ and, therefore, in sale, it is applied exclusively to the right of the seller to detain *res sua*, against one who has only a *jus ad rem*. "Lien," on the other hand, is used to signify a right depending on possession of *res aliena*, and in this sense it is common to the law of England and

¹ Retention is sometimes applied in a much wider sense, and the right has been said to belong to "every legal possessor of a subject till all the debts due to him by the proprietor are paid." See exhaustive argument on the subject in report by Robert Bell of the case of *Harper's Creditors v. Faulds* (1791), Bell's *Cases*, 8vo, pp. 440 *et seq.* It was claimed in this case by a bleacher in respect of a general balance, but by a narrow majority, the claim was negatived. The view referred to was thus expressed by Lord Monboddo: "Compensation and retention are the same in principle; the ground of equity is this, that a person is not obliged to pay a debt while the creditor is at the same time due something to him. If the claims be of the same nature it is called compensation; if different it gets the name of retention"—Bell's *Cases*, 8vo at p. 467. See also *Brown v. Somerville* (1844), 6 D. 1267. The whole subject of retention, including its relation to arrestment and compensation, is discussed by Professor More, whose work is characterised by Lord President Inglis as "a scientific and justly admired dissertation on the subject." [*National Bank v. Union Bank* (1885), 13 Ret. 380 at p. 410.] The following passage explains the general argument: "Retention seems the necessary counterpart of the diligence of arrestment in security, and appears to be necessary to give consistency to a system of jurisprudence where such diligence is recognised. It would be a strange anomaly if a third party could by arrestment compel the holder of any fund or article which belonged to the common debtor, to retain it for his behoof in security of his debt, while the holder himself could not retain it for his own behoof in security of a similar debt which was due to himself before the arrestment was used. The diligence of arrestment in security being unknown to the common law of England, no right of retention at common law is there allowed. This, too, seems necessary to give consistency to the English system of jurisprudence; for where a creditor could not, by the legal use of diligence, acquire any preference over a fund or article belonging to his debtor, which happened to be in the hands of a third party, it would be anomalous to allow this third party by his accidental possession of such fund or article to acquire any preference over it for the payment of his own debt to the prejudice of the other creditors of the owner. It thus appears that our own system of jurisprudence in adopting the doctrine of retention, and the English system in rejecting it, have each proceeded upon those peculiarities in their respective systems which are requisite to give consistency to each"—More's *Lectures*, vol. i. p. 402.

Scotland.¹ It is true that in the law of England "lien" is used in a different and more extended sense in sale than in any other contract, and that it gives rights to a seller in security of the price which are inconsistent with a *complete* right of property in the buyer. It does not, however, permit of goods being retained for any debt other than the price of the goods themselves, and it is to be observed that it is only where the property has passed to the buyer in the sense of Sect. 17 of this Act, that lien comes into existence. Prior to the transfer of the property, the seller's right is that of an undivested owner, just as, in Scotland, the seller had formerly a right of retention down to the passing of the property by delivery. In both cases the seller could detain the goods until every debt due to him by the buyer was satisfied. When the property has passed, the seller's right is limited to a security for the price of the particular goods sold. That this is the intention of the Act as regards Scotland as well as England, is shown by the special definition of "retention" given in this section, viz. "a right to the unpaid seller to retain the goods *for the price* while he is in possession of them." The objection is that, in Scotland, this is not the common-law meaning of "retention," and that the limited right, as expressed, is neither more nor less than the vendor's lien in England. The right in both countries could with perfect propriety have been signified by the word "lien." The added words were apparently introduced

¹ The distinction is enforced by Lord President Inglis in *Black v. Incorporation of Bakers* (1887), 6 Macp. 136 at p. 140. See also opinions by Lord President Inglis in *National Bank of Scotland v. Forbes* (1858), 21 D. 79 at p. 85; *Wyper v. Harveys* (1861), 23 D. 606 at p. 611; *National Bank v. Union Bank* (1886), 13 Ret. 380 at p. 410. The last of these cases was reversed on appeal (1886), 14 Ret. H.L. 2. As to the application of lien in England see *Lickbarrow v. Mason* (1793), 6 East 21, where Buller, J., said: "Neither lien nor stoppage *in transitu* are founded on property; they necessarily suppose the property to be in some other person, and not in him who sets up either of these rights. They are qualified rights which in given cases may be exercised over the property of another, and it is a contradiction in terms to say a man has a lien upon his own goods, or a right to stop his own goods *in transitu*. If the goods be his, he has a right to the possession of them whether they be *in transitu* or not; he has a right to sell or dispose of them as he pleases, without the option of any other person; but he who has a lien only on goods has no right to do so, he can only retain them till the original price be paid"—6 East at p. 25.

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Analogy of
Factors Act.

on the analogy of The Factors (Scotland) Act 1890,¹ but the Factors Act did not change the law of Scotland as to passing the property, and therefore, it was not only appropriate but indispensable, that the seller's right of retention in its comprehensive sense should be preserved.

Suggestion
that retention
is a rule of
bankruptcy.

In the foregoing remarks it has been assumed as beyond dispute, that the intention as regards Scotland is to restrict to a lien for the price, as in England. It has, however, been suggested, by one whose opinion deservedly carries the weight of authority both in England and Scotland, that "the right of retention for a general balance is one of the rules of bankruptcy referred to in Sect. 61 (1), and is not disturbed by the provisions of the Act." If this were the case, the consequences to the law of Scotland would be serious. The sale sections of The Mercantile Law Amendment Act of 1856² were passed on the recommendation of the Commissioners of 1855, who thought the seller's retention as against a *bona-fide* sub-buyer for a general balance due by the first buyer, was "injurious to commerce." The Commissioners' Report expressly bore that in this matter the law of Scotland should be assimilated to that of England and Ireland, with certain modifications rendered necessary by the different principle of passing the property which then existed in Scotland.³ The sections referred to are, however, repealed by the present Act;⁴ and therefore, if the right of retention for a general balance is not disturbed, it follows that the repeal leaves the law of Scotland as it was prior to 1856,⁵ except that the principle upon which the right was formerly exercised is now entirely subverted. It is submitted that this result was never contemplated, and that it is unfortunate if, by the use of the word "retention" in this and subsequent sections, any countenance has been given to a view which tends not to assimilation of the law, but to greatly increased diversity.⁶

Objections.

¹ 53 & 54 Vict. c. 40, Sect. 1 (1).

² 19 & 20 Vict. c. 60, Sects. 1 to 4.

³ 2nd Report, p. 9. See also Appendix to Report, p. 44.

⁴ Sect. 60 and relative Schedule.

⁵ On this assumption Sect. 47 would have entirely different meanings in Scotland and England.

⁶ Benjamin speaks of retention in Scotland as equivalent to stoppage

40. In Scotland a seller^(a) of goods may attach the same while in his own hands or possession^(b) by arrestment or poiding;^(c) and such arrestment or poiding shall have the same operation and effect in a competition or otherwise as an arrestment or poiding by third party.^(d)

Sect. 40.

ATTACHMENT
BY SELLER IN
SCOTLAND.

NOTES.

(a) "Seller." Defined Sect. 62 (1). "Unpaid seller." Defined Sect. 38.

(b) "Possession" is not defined in this Act; but see Factors Act 1889, Sect. 1 (2).¹

(c) "Arrestment or poiding." Poiding, and not arrestment, is the proper diligence. "A creditor cannot arrest in his own hands, because arrestment is a diligence *in personam*, and operates as a restraint upon third parties, who are prohibited from performing the obligations in favour of the debtor until the right of the arresting creditor shall be satisfied. But poiding is *in rem*, and if the poided goods are the property of the debtor, the fact of their being in the creditor's possession does not appear to create any obstacle to their being poided."² Under the repealed

ante transitum in England—Benjamin, *Sale*, p. 768 and note. If by stoppage *ante transitum* is meant stoppage before the transit has commenced, then if the property has passed to the buyer, retention in its Scottish sense is certainly not its equivalent, for such stoppage is simply the seller's lien for the price. If, however, in a stoppage *ante transitum* the property has not passed to the buyer, retention has practically the same effect. As to the meaning of stoppage *ante transitum* see remarks of Crompton, J., in *Griffiths v. Perry* (1859), 1 E. & E. 680 at p. 688. The meaning suggested by Benjamin (*Sale*, p. 768) seems somewhat special.

¹ Text in Appendix I. *post*, p. 297.

² Per Lord Kinnear (Ordinary) in *Lochhead v. Graham* (1883), 11 Ret. 201 at p. 204. "A man may cause poid goods of his debtors that are in his own custody and that for debt owing to him by the debtor"—*Tillicoultry v. Laird of Rollo* (1678), Fountainhall, i. 10. But the position of a creditor holding his debtor's goods was one of acknowledged difficulty. "It is said that a person in possession is in a worse situation than any other creditor; but this is by no means the case. He may do diligence in the name of a trustee, or deposit the goods in the hands of a third party, and carry on the diligence in his own name."—Per Lord Dregorn in *Harper's Creditors v. Paulds* (1791), Bell's Cases, 8vo, 440 at p. 465. This assumes that the creditor's right to arrest in his own hands was not competent apart from the devices mentioned. Ross, however, suggests that the creditor could have poided—*Leading Cases, Com. Law*, ii. 740. Professor More argues with much force and clearness that the right of retention is the counterpart of

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section of the Mercantile Law Amendment Act,¹ which this section has supplanted, it was of little consequence which term was applied, since both were equally inappropriate. Under that Act the remedy was not a diligence, but a piece of legal machinery invented as a "limited or modified substitute for the seller's former broad right of retention."² But now that the property in specific goods may be in the buyer while the seller retains the custody, the seller's remedy is really a diligence against his debtor's goods, and pouncing is the proper form of that diligence.

(d) This section is taken from Sect. 3 of The Mercantile Law Amendment Act, Scotland, 1856,³ with the omission of certain particulars referring to the special procedure created by that Act. In consequence of the passing of the property to the buyer under the present Act, what in the Mercantile Law Amendment Act was a confusing anomaly, has now become an appropriate diligence. The section is declaratory of the common law so far, at least, as the diligence of pouncing is concerned, and it might have been omitted as mere matter of procedure but for a possible negative inference from the repeal of identical words in the old statute. Where the seller's right of lien or so-called retention is defeated, as by the transfer of a document of title under Sect. 47, the right to arrest or pound is necessarily gone. The goods no longer belong to the seller's debtor.

Unpaid Seller's Lien.

Sect. 41.

SELLER'S
LIEN.

41.—(1.) Subject to the provisions of this Act,^(a) the unpaid seller^(b) of goods^(c) who is in possession^(d) of them is entitled to retain possession of them until payment or tender^(e) of the price^(f) in the following cases, namely :—

(a.) Where the goods have been sold without any stipulation as to credit ;^(g)

arrestment, and that wherever a third party could arrest the goods, a creditor in possession ought to have the power to retain in preference to such arrestment.—More's *Lectures*, i. 402 *et seq.* See passage quoted *ante*, p. 186, note.

¹ 19 & 20 Vict. c. 60, Sect. 3, repealed by Sect. 60 of this Act and relative schedule.

² Per Lord President M'Neill in *Wyper v. Harveys* (1861), 23 D. 606 at p. 618. See also *Brownie and Co. v. Ainslie and Co.* (1893), 21 Ret. 173.

³ 19 & 20 Vict. c. 60.

- (b.) Where the goods have been sold on credit, but Sect. 41.
the term of credit has expired ;^(a)
- (c.) Where the buyer becomes insolvent.^(b)
- (2.) The seller may exercise his right of lien^(c) notwithstanding that he is in possession^(d) of the goods as agent or bailee or custodier^(e) for the buyer.^(f)

NOTES.

- (a) *E.g.* Sects. 42 and 43.
- (b) "Seller." Defined Sect. 62 (1). "*Unpaid seller.*" Defined Sect. 38.
- (c) "Goods." Defined Sect. 62 (1).
- (d) "*Possession.*" Defined in Factors Act 1889,¹ Sect. 1 (2). Where the seller is a warehouseman a marking in the warehouse books of the buyer's name as owner will not divert the right of lien, as would have been the case if the goods had been in the warehouse of a third party. See note (l) *infra*.
- (e) "*Payment or tender.*" See Sect. 27. "It is the buyer's duty under the contract to make actual payment in cash, or a tender of payment which is as much a performance and discharge of his duty as an actual payment. A tender is only validly made when the buyer produces and offers to the vendor an amount of money equal to the price of the goods. But the actual production of the money may be dispensed with by the vendor. The Courts, however, have been rigorous in requiring proof of a dispensation with the production of the money."²
- (f) "*Price.*" See Sects. 8 and 9.
- (g) *Credit.* "The vendor may agree to sell on credit, that is, to give to the buyer immediate possession of the goods, and trust to his promise to pay the price *in futuro*. Such an agree-as this amounts plainly to a waiver of the lien, and if the buyer

¹ 52 & 53 Vict. c. 45.

² Benjamin, p. 720. *Douglas v. Patrick* (1790), 3 T.R. 683; *Lockyer v. Jones* (1796), Peake 239, note; *Dickinson v. Shee* (1801), 4 Esp. 68; *Thomas v. Evans* (1808), 10 East 101; *Read v. Goldring* (1813), 2 M. & S. 86; *Alexander v. Brown* (1824), 1 C. & P. 288; *Harding v. Davies* (1825), 2 C. & P. 77; *Leatherdale v. Sweepstone* (1828), 3 C. & P. 342; *Finch v. Brook* (1834), 1 Bing. N.C. 253; *Isherwood v. Whitmore* (1843), 11 M. & W. 347. The tender must be in current coin, or foreign money made legally current by proclamation; and see Coinage Act 1870 (33 Vict. c. 10), Sects. 4 and 7. As to Bank of England notes see 3 & 4 William IV. c. 98, Sect. 6. See also *Com. ante*, p. 41.

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then exercises his rights and takes away the goods nothing is left but a personal remedy against him.”¹

(h) A payment by bill usually indicates a sale on credit, but if for the buyer's convenience, or for any other reason, the goods remain in the custody of the seller until the bill has become due, and it is not then paid, the seller's lien for the price revives. In *Valpy v. Oakeley*² (1851), Wightman, J., said: “I see nothing to distinguish this from the ordinary case of lien of an unpaid vendor. As long as the bills were running they may be taken to have been *prima facie* payment, but they were dishonoured before the iron was delivered, and in that case I have no doubt that the vendor's lien attaches, and that he may retain his goods until he is paid.”³ The other judges concurred on this point.

(i) “If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession.”⁴

(j) The words “or retention” are not inserted here as in Sects. 42, 43, 47, and 48. They are also omitted in the rubric of Sect. 48. The words are unnecessary, but if inserted at all, there seems no reason for the omission in this section. See COM., Sect. 39 *ante*, p. 186.

(k) “Bailee or custodier.” “Bailee, in Scotland, includes custodier” [Sect. 62 (1)]. The word “custodier” was inserted in order to adapt the bill to Scotland, but if “bailee” includes custodier, the latter word might have been dispensed with in the various sections where “bailee” occurs.

(l) In England, where the property has passed, the seller may maintain an action against the buyer for “goods sold and delivered” although the goods are still in the actual custody of the seller. It has been urged that where the seller is bailee or custodier for the buyer, as where, *e.g.*, he has granted a delivery order, the seller's lien is gone, but this contention was negatived at least as early as 1836. In *Townley v. Crump*,⁵ in that year, Lord Denman, in giving the opinion of the Court, said: “There was a total failure of proof that where a vendor who is himself the warehouseman, sells to a party who becomes bankrupt before the goods are removed from the warehouse, the delivery order operates by reason of this custom to prevent a lien from

¹ Benjamin, p. 767.

² 16 Q.B. 941.

³ 16 Q.B. at p. 950.

⁴ Per Bayley, J., in *Bloxham v. Sanders* (1825), 4 B. & C. 941. See also *Ex parte Chalmers* (1878), L.R. 8 Ch. App. 289.—Per Mellish, J., at p. 291.

⁵ 4 Ad. & E. 58.

attaching, and I think it is not contended that there is any general usage which could divest the right in such a case upon the insolvency of the vendee. Cases have been cited, but none where the question arose *between the original vendor and vendee.*"¹ Sub-sect. (2) as originally drafted, was confined to cases where the buyer was insolvent.² It was altered to its present form in the bill of 1891. Sect. 41.

COMMENTARY.

Seller's lien possesses the characteristic common to all liens, of being a right over the property of a person other than the person seeking to enforce it. It has no existence before the property has passed, because, till then, the seller is undivested owner, and can do what he pleases with his own.³ Until the property has passed, the seller's right is one of "retention," which in England and Scotland alike, applies only to the period anterior to divestiture. It is the earlier divestiture which now takes place in Scotland through the introduction of the English principle of passing the property, which has rendered the word "retention" inappropriate to the subject matter of this part of the Act.⁴ Seller's lien.

The lien of the seller for the price is more extensive than an ordinary lien, which would entitle him to retain for the price, but would not enable him to confer any title on a third party, either by way of re-sale or pledge. "It interferes not only with the purchaser's right of possession, but also with his right of property."⁵ On the other hand, it "does not amount to a right to resume a complete right of property, so as to divest totally the purchaser's right of property. In other words, the vendor cannot treat the contract as rescinded, so as to resume his property as if the sale had never been made."⁶ The lien extends only to the price of the goods; not to warehouse or other charges, which at best form only a personal claim against the buyer. "I am clearly of opinion," said Lord Wensleydale, "that no person More extensive than ordinary lien.

Limitations of lien.

¹ 4 Ad. & E. at p. 63.

² Chalmers on *Sale of Goods* (1890), p. 59.

³ See Blackburn on *Sale*, p. 244.

⁴ See Com., Sect. 39 *ante*, p. 186.

⁵ Blackburn on *Sale*, p. 445.

⁶ *Ibid.*

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has by law a right to add to his lien upon a chattel, a charge for keeping it till the debt is paid ; that is, in truth, a charge for keeping it for his own benefit, not for the benefit of the person whose chattel is in his possession." ¹

The vendor's lien may be defeated by the transfer of a document of title in terms of the proviso attached to Sect. 47 of this Act.

Scottish
precedents.

*Fleming v.
Smith.*

Scottish precedents prior to the passing of the Act must be used with care in view of the important change resulting from the passing of the property before delivery. In *Fleming v. Smith and Co.*² (1881) the law of England was much discussed and was to some extent founded on. In this case, buyers to whom credit by bill at one month had been given, sold the goods during the currency, and granted a delivery order to the sub-purchaser. The delivery order was intimated to the unpaid sellers, but they did not acknowledge it further than to enter it in their books for the purpose (as they afterwards alleged) of preserving a record so as to prevent delivery to the original purchasers. At the expiry of the credit the bill was dishonoured, and the unpaid sellers, who still retained the actual custody, claimed to retain against the sub-purchaser who did not offer to pay the price. The Court held that the sellers had no right of retention even for the unpaid price, and that they were bound to deliver to the sub-purchaser. The majority of the judges proceeded on the principle of constructive delivery, which they held to have been completed by the intimated delivery order. English authority as set forth in Benjamin, was largely founded on, but the judgment is open to the following observations:—(1) The Court expressly held that the goods, though in a refiner's warehouse, were under the control of the sellers, and in law were, and con-

¹ In *Somes v. British Empire Shipping Co.* (1860), 8 H.L. Cas. 338 at p. 345. In the same case, however, Lord Cranworth suggested that if the plaintiffs, who claimed a lien over a ship for its repairs, had put their claim, not upon lien, but upon "an obligation on the part of the owners of the ship to pay a reasonable sum for the use of the dock for the time it was so improperly left there," it might have been sustained.—8 H.L. Cas. at p. 344. If third parties' interests are not concerned, it seems a mere matter of pleading. See as to lien generally, Benjamin, p. 807 *et seq.*

² 8 Ret. 548.

tinued to be, in their actual custody. The delivery order was addressed to the sellers, not to the keeper of the warehouse, and it was in the sellers' books that it was noted. It was not, therefore, a case of constructive delivery of goods in the hands of a third person as in section 29 (3) of this Act.¹ (2) The mere noting of the intimation in the unpaid sellers' books could not of itself amount to an acknowledgment that thenceforward they held for a third party with whom they had had no previous dealings; still less could it be held as a waiver of their right of retention for the price, or for a general balance if such existed.² (3) If the circumstances did not show constructive delivery under English law, as little did the judgment conform to Scottish precedent. The case of *Mathieson v. Alison*³ (1854) was in some respects similar to the one in question, with the very important difference that the price was paid, notwithstanding which, the goods were held to remain the property of the sellers, and to belong to their trustee in bankruptcy. Other similar decisions were cited in *Distillers' Co. Ltd. v. Russell's Trustee*⁴ (1889), which, although itself much in point, was subsequent in date to the judgment now under review. (4) No question was raised as to the effect of the delivery order as a document of title under the then existing Factors Acts. Section 5 of the Factors Act of 1877⁵ was similar in its terms to the proviso attached to Sect. 47 of this Act, but neither seems applicable to the delivery order in question, which was not a document of title *trans-* Sect. 41.

¹ "Constructive delivery by means of a delivery order can only take place where there are three independent persons—the vendor, the vendee, and the custodian of the goods"—Guthrie's notes to Bell's *Prin.*, Sect. 1303. The old case of *Broughton v. Aitchisons* (15th November 1809), F.C., seems inconsistent, but the Court was nearly equally divided, and M. P. Brown, writing in 1821 (*Sale*, p. 525), thought the point uncertain. It was distinctly laid down in *Mathieson v. Alison* (1854), 17 D. 274, and *Anderson v. McCall* (1866), 4 Macp. 765, that goods in the seller's own possession could not be effectually transferred to the buyer by any act of constructive delivery. As to English law, see *Dixon v. Yates* (1833), 5 B. and Ad. 313, where Denman, C. J., said: "It seems to me that nothing short of an actual delivery could divest a vendor of the right to stop *in transitu*, which is admitted to be analogous to the right of retaining."

² Sheriff Guthrie suggests an explanation of the decision on the ground of waiver.—Bell's *Prin.* (9th edition), Sect. 116.

³ 17 D. 274. See also *Anderson v. McCall* (1866), 4 Macp. 765.

⁴ 16 Ret. 479.

⁵ 40 & 41 Vict. c. 39.

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ferred to the buyer (*i.e.* the first buyer), but was one created by him. (5) The aid of the Mercantile Law Amendment Act 1856¹ was not invoked because, under that Act, the sub-purchaser was required to pay the price as a condition of obtaining delivery, but the very existence of that condition justifies the inference that without payment of the price to the unpaid seller, a sub-purchaser was not, under the law of Scotland, entitled to delivery.

Analogy of
intimated
assignation of
moveables.

The foregoing criticism of the judgment in *Fleming v. Smith and Co.* may be useful, not because of the intrinsic importance of the case, but because it illustrates a misconception of the seller's right as it existed in Scotland before this Act, and also a misapplication of English law. It only remains to notice the opinion of Lord Justice-Clerk Moncreiff, who, while not differing from the other judges, preferred to rest his opinion on the law of Scotland alone. He founded his judgment upon the effect of an intimated assignation of the property in goods, apparently on the analogy of an intimated assignation of incorporeal moveables, such as debts.² But assuming the analogy to be perfect, the assignee in such a case could not take a higher right than that of the assignor,—*assignatus utitur jure auctoris*. As, therefore, the first purchaser was liable in the price, so also the sub-purchaser must have paid the price before he could take the goods out of the possession of the original seller. It is true, as Lord Justice-Clerk Moncreiff strongly urged, that at the date of the delivery order which was supposed to form the assignation, there was a contract to sell on credit, and that the credit had not expired, but is this any reason for separating the rights from the obligations of a mutual contract, and assigning the one without regard to the other? What was it that the first purchaser had it in his power to assign? A right to demand delivery, subject to an obligation to pay the price at a future date. The obligation to pay the price was not the less an essential term of the contract, that it was not immediately prestable.

¹ 19 & 20 Vict. c. 60.

² The analogy is not new. It pervades much of the argument in *Wyper v. Harveys* (1861), 23 D. 606, and is to be met with in many other cases.

It existed in full force at the date of the delivery order, and was actually exigible before the assignee was in a position to demand implement of the right assigned. If the delivery order was good as an assignation, the assignee could have made the same demand as his author, but nothing more: if the term of credit had not expired, he was entitled to demand delivery, but when the credit expired he was bound to pay the price. It may further be pointed out that a delivery order is not a formal assignation, and can only be elevated into that position on the ground of mercantile usage, which clearly does not exist to the effect of cutting off the seller's claim for the price of goods still in his possession. Sect. 41.

42. Where an unpaid seller^(a) has made part delivery^(b) of the goods, he may exercise his right of lien or retention^(c) on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive^(d) the lien or right of retention. Sect. 42.
PART DELIVERY.

NOTES.

(a) "*Unpaid seller.*" Defined Sect. 38.

(b) "*Delivery.*" Defined Sect. 62 (1). "*Part delivery.*" See Sect. 31. "It is said that by taking possession of the two puncheons, the buyer took possession of the whole; but it is clearly established that if part be delivered with an intent to separate that part from the rest, it is not an inchoate delivery of the whole so as to divest the right of property out of the vendor."¹ "If both parties intend delivery of a part as a delivery of the whole, then it is a delivery of the whole, but if either of the parties does not intend it as a delivery of the whole, if either of them dissents, then it is not a delivery of the whole."²

¹ Per Parke, J., in *Dixon v. Yates* (1833), 5 B. & Ad. 313 at p. 341. See also *Denman, C. J.*, to the same effect at p. 336.

² Per Lord Blackburn in *Kemp v. Falk* (1882), 7 App. Cas. 573 at p. 586. See also *Payne v. Shadbolt* (1808), 1 Camp. 427; *Bunney v. Poyntz* (1833), 4 B. & Ad. 568; *Miles v. Gorton* (1834), 2 Cr. & M. 504, and cases under Sect. 45 (7) relating to stoppage *in transitu*, *post*, p. 222. As to instalment deliveries, see Sect. 31 *ante*, p. 147; *Ex parte Chalmers* (1873), L.R. 8 Ch.

Sect. 42.

(c) "*Lien or retention.*" "Lien in Scotland includes right of retention"—Sect. 62 (1). See COM., Sect. 39 *ante*, p. 186.

(d) "*Agreement to waive.*" Such an agreement may be express, or may be inferred from a course of dealing, or from usage, Sect. 55. It may also be inferred from other circumstances, e.g. the delivery of an essential part of an article consisting of several parts¹ or delivery given to a party in a special character, such as a trustee in bankruptcy.²

Sect. 43.**TERMINATION
OF LIEN.**

43.—(1.) The unpaid seller^(a) of goods^(b) loses his lien or right of retention^(c) thereon—

(a.) When he delivers^(d) the goods to a carrier^(e) or other bailee or custodier^(f) for the purpose of transmission to the buyer^(g) without reserving the right of disposal of the goods^(h);

(b.) When the buyer or his agent⁽ⁱ⁾ lawfully^(j) obtains possession^(k) of the goods^(l);

(c.) By waiver thereof.^(m)

(2.) The unpaid seller^(a) of goods, having a lien or right of retention^(c) thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree⁽ⁿ⁾ for the price of the goods.^(o)

NOTES.

(a) "*Unpaid Seller.*" Defined Sect. 38. "*Seller*" defined Sect. 62 (1).

(b) "*Goods.*" Defined Sect. 62 (1).

(c) "*Lien or right of retention.*" "Lien in Scotland includes right of retention," Sect. 62 (1). See COM., Sect. 39 *ante*, p. 186.

App. 289; *Merchant Banking Co. v. Phoenix Bessemer Steel Co.* (1877), 5 Ch. Div. 205. M. P. Brown's statement of the law of England on this subject (*Sale*, p. 482) is erroneous. It is founded on the cases of *Shubey v. Heyward* (1795), 2 Hy. Bl. 504, and *Hammonds v. Anderson* (1803), 1 B. & P. N.R. 69, as to which see *Ex parte Cooper* (1879), 11 Ch. D. 68.

¹ Per Cotton, L. J., in *Ex parte Cooper* (1879), 11 Ch. Div. at p. 75.

² *Jones v. Jones* (1841), 8 M. & W. 431.

(d) "*Delivers.*" "Delivery" defined Sect. 62 (1). For rules Sect. 43. as to delivery, see Sect. 29.

(e) "*Carrier.*" Delivery to a carrier is *prima facie* delivery to the buyer, Sect. 32. "Delivery of the goods to a common carrier for conveyance to the buyer, is such a delivery of actual possession to the buyer through his agent the carrier, as suffices to put an end to the vendor's lien."¹

(f) "*Bailee or Custodier.*" "'*Bailee*,' in Scotland, includes custodier" [Sect. 62 (1)]. The word "custodier" is unnecessary here.

(g) "*Buyer.*" Defined Sect. 62 (1).

(h) *Reservation of right of disposal.* See Sect. 19.

(i) *Buyer's agent* includes a sub-buyer,² and a trustee in bankruptcy.³ As to seller's agent, see COM., Sect. 44 *post*, p. 207.

(j) "*Lawfully.*" This word was added in Committee. It does not appear in the corresponding provision as to stoppage *in transitu* [Sect. 45 (2)], and perhaps the rule is different. See *Whitehead v. Anderson*⁴ (1842), but see as to Scotland, *Schuermans and Sons v. Goldie*⁵ (1828), and COM., Sect. 45 *post*, p. 213.

(k) "*Possession.*" Defined in Factors Act 1889⁶ Sect. 1 (2).

(l) *Possession by buyer.* "The vendor's lien is abandoned when he makes delivery of the goods to the buyer. . . . As soon as a bargain and sale are completed the buyer becomes at once vested with the ownership and the right of possession, but *actual* possession does not pass by the mere contract. Something further is required, unless, indeed, the buyer had been previously in actual possession as bailee of the vendor, in which case, of course, the vendor's assent that the buyer shall henceforth possess in his own right as proprietor of the thing, would make a complete delivery for all purposes."⁷ The words "unless there be an agreement to the contrary" were inserted at this place in the original bill, but were struck out in Committee.

(m) "*By waiver.*" The right of lien may be waived either expressly or by implication. The seller may take a bill for the price, in which case (unless it is otherwise agreed) the lien is

¹ Benjamin, p. 813. See *Jones and Co. v. Ross* (1830), 8 Sh. 495; *Dutton v. Solomonson* (1803), 3 B. & P. 582; *Ex parte Pearson* (1868), L.R. 3 Ch. App. 443; *Bell on Sale*, p. 86.

² *Dixon v. Yates* (1833), 5 B. & Ad. 313.

³ See COM., Sect. 45 *post*, p. 216.

⁴ 9 M. & W. 518.

⁵ 6 Sh. 1110.

⁶ 52 & 53 Vict. c. 45. Text in Appendix I. *post*, p. 297.

⁷ Benjamin, p. 811. See *Harman v. Anderson* (1809), 2 Camp. 243; *Hawes v. Watson* (1824), 2 B. & C. 543; *Dodsley v. Varley* (1840), 12 A. & E. 632; *Cooper v. Bill* (1865), 34 L.J. Ex. 161, 3 H. & C. 722.

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waived during its currency, or he may consent, either expressly or by implication, to a sub-sale, in which case he is barred *personali exceptione* from enforcing his lien,¹ or he may part with documents of title.²

(n) "*Decree*" was inserted in adapting the bill to Scotland.

(o) *Effect of judgment or decree.* See COM. *infra*.

COMMENTARY.

Sub-sect. (2).
Effect of
judgment or
decree.

Sub-sect. (2) negatives a proposition which might be put forward in England, but which would have been quite unintelligible under the former law of Scotland. In Scotland, no property in goods sold passed to the buyer without possession. The ownership of goods sold could not, therefore, have been changed by any merely personal decree against either seller or buyer. In England, on the other hand, a satisfied judgment often has the effect of passing the property. Thus where a party holds goods without title and is sued by the owner for their value, the judgment *when satisfied* will pass the property in these goods to the party against whom the action is directed. The practical result would no doubt have been the same in Scotland, but in theory, the new right of ownership would have proceeded upon the changed character of the *possession*, not upon the direct effect of the decree. But, even in England, "an *unsatisfied* judgment in trover does not pass the property, and is a mere assessment of damages, on payment of which the property vests in the defendant."³ In like manner a judgment in England, when satisfied, will loose the vendor's lien upon the buyer's property still in the hands of the seller, and the object, therefore, of this sub-section is to make it clear that the mere obtaining of the judgment will not have this effect. Nor will partial satisfaction have any effect in removing the lien. Thus, where the judgment debt

¹ See *Knights v. Wiffen* (1870), L.R. 5 Q.B. 660; Blackburn on *Sale*, pp. 190 *et seq.* A recent Scottish case was decided in the Outer House on the ground of waiver by the sellers of their right of retention—*Robertson and Baxter v. M'Pherson Bros.* (20th July 1898), 1 Scots Law Times 159.

² See Sect. 47.

³ Benjamin, p. 59.

is to be paid by instalments, the full lien will subsist although some of these instalments may have been paid.¹ **Sect. 43.** In Scotland, the property now passes irrespective of possession, in the same manner as in England, and the effect of a decree will, therefore, be precisely the same as that of an English judgment, and subject to the same limitations. It will be observed that though the exercise by the seller of his right of lien does not rescind the sale, it gives the seller a right to re-sell, and the new buyer gets a valid title which necessarily takes all right of property out of the first buyer (Sect. 48). But this right of re-sale, if not exercised, and also the right of lien itself (Sect. 41), necessarily cease upon payment by the buyer of the amount in a decree for the price, and the property in the buyer, which was formerly liable to be defeated, now becomes absolute. The price has been paid by means of the decree, and the vendor is no longer an "unpaid seller" (Sect. 38).

There are other circumstances in which a satisfied judgment or decree affects the right of property. If, for example, the seller wrongously refuses to deliver goods the property in which has passed to the buyer, and the buyer obtains decree for damages under Sect. 51, payment by the seller of the amount in the decree will necessarily re-vest the property in the seller or his assignee, irrespective of the special right in the seller to give a title to another buyer under Sect. 25 (1).²

Stoppage in transitu.

44. Subject to the provisions of this Act,^(a) when **Sect. 44.** the buyer^(b) of goods^(b) becomes insolvent,^(c) the unpaid seller^(d) who has parted with the possession^(e) of the goods has the right of stopping^(f) them in transitu, that is to say, he may resume possession of

RIGHT OF
STOPPAGE IN
TRANSITU.

¹ *Scrivenor v. The Great Northern Railway Co.* (1871), 19 W.R. 388.

² See note (h), Sect. 1 *ante*, p. 2.

Sect. 44. the goods as long as they are in course of transit,^(a) and may retain them until payment or tender^(a) of the price.^(a)

NOTES.

(a) "*Subject to the provisions of this Act.*" E.g. the proviso attached to Sect. 47, under which stoppage *in transitu* may be defeated. See also Sects. 45 to 47 inclusive. If the seller has reserved the right of disposal under Sect. 19, the property has not passed, and stoppage *in transitu* is unnecessary. If the seller resumes actual custody he does so in virtue of his right as undivested owner.

(b) "*Buyer,*" "*goods.*" Defined Sect. 62 (1).

(c) "*Insolvency*" defined Sect. 62 (3). It is not necessarily bankruptcy, nor even notour bankruptcy. See *COM. post*, p. 288. Although at the date of the stoppage the buyer is solvent, his subsequent insolvency before delivery to him will render the stoppage effectual.¹

(d) "*Unpaid seller.*" Defined Sect. 38. See *COM. infra*, p. 207.

(e) "*Possession.*" Defined in Factors Act 1889, Sect. 1 (2). No definition is attempted in this Act. The right to resume possession only extends to the goods themselves, not to a surrogatum, such as the proceeds of a policy of insurance taken out by the buyer.²

(f) "*Right of stopping.*" A right (unless otherwise provided) may be enforced by action. Sect. 57.

(g) "*In course of transit.*" As to duration of transit see Sect. 45.

(h) "*Payment or tender.*" See Sect. 41, note (e) *ante*, p. 191.

(i) "*Price.*" See Sects. 8 and 9.

COMMENTARY.

Stoppage *in transitu* an extension of lien.

Stoppage *in transitu* may with perfect propriety be called an equitable extension of the seller's right of lien.³

¹ Benjamin, p. 351; *The Constantia* (1807), 6 Rob. Adm. Rep. 321, per Lord Stowell at p. 326. See also *The Tigress* (1863), 32 L.J. Adm. 97 at p. 101.

² *Bernidson v. Strang* (1868), 3 Ch. App. 588.

³ It is so spoken of by Bell (*Prin.*, Sect. 1307), and by Houston (Stoppage *in transitu*, p. 2).

The governing principles of each of these rights, though differing in many respects from the ordinary rules of contract, very nearly resemble each other. Both are seller's remedies against the goods, and have for their object the securing of the unpaid price. Both necessarily suppose the property to be in the buyer, but although the property must have passed, the possession remains with the seller or with a carrier. In both, the right ceases after the goods have been delivered into the actual or constructive custody of the buyer or his agent, other than a carrier conveying the goods towards the buyer or in terms of the contract. Lien exists so long as the unpaid seller retains actual or constructive possession, and ceases the moment that possession is lost; stoppage begins where lien ends, and continues so long as the goods, although in a sense delivered to the buyer through his agent the carrier (Sect. 32), are still in course of transit. In one important respect, however, the rights differ. Lien can be exercised whether the buyer is insolvent or not: stoppage is only available when the buyer is insolvent according to the definition of insolvency given in Sect. 62 (3) of this Act. If the seller stop *in transitu* before actual insolvency, he does so at his peril. If, when the goods arrive at their destination, the buyer continues solvent, the goods must be delivered, and the seller will be liable in any expenses incurred.¹

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Insolvency of
buyer neces-
sary to
stoppage.

Stoppage *in transitu* is said to have been introduced into England in 1690 by the case of *Wiseman v. Vandeput*.² This was a Chancery case, and therefore, if correctly cited as the first instance of stoppage *in transitu*, it settles the fruitless discussion as to whether the right had its origin in Equity or at Common Law according to the distinction so long established in England, but now happily almost abolished.³

Origin of
stoppage *in*
transitu—
England.

¹ Per Lord Stowell in *The Constantia*, 6 Rob. Adm. Rep. 321.

² 2 Vernon's Repts. p. 208.

³ "I have always thought it highly injurious to the public that different rules should prevail in the different Courts on the same mercantile case. . . . The mercantile law of this country is founded on principles of Equity; and when once a rule is established in that Court as a rule of property, it ought to be established in a Court of Law."—Per Buller, J., in *Tooke v. Hollingsworth* (1793), 5 T.R. 215 at p. 229. Equity and Common Law were to a large extent fused by the Judicature Act of 1873 (36 & 37 Vict. c. 66).

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Although originating in Equity, it was soon adopted by the Courts of Common Law, and numerous cases after 1743 show that, from that date onwards, it had obtained a firm footing in England.¹

Scotland.

In Scotland, the right of stoppage was not recognised till near the end of the eighteenth century. In earlier cases the rule of the Roman law which allowed the seller to claim the goods for the price even after delivery, was often pleaded, and was sometimes allowed on the ground of presumptive fraud in the buyer, but this rule was latterly restricted to a period of three days after delivery.² In *Prince v. Pallat*³ (1680) the seller's right to stop *in transitu* was strongly urged on the ground that delivery to the carrier was not delivery to the buyer. The Lords, however, found "that the wines being delivered to the skipper upon the buyer's order, the property was stated in the buyer, and that there was no hypothec in ware by the law of Scotland."⁴

*Allan, Stewart,
and Co. v.
Stein's
Creditors.*

The rule *intra triduum* which prevailed in Scotland after 1736, was pleaded and sustained by the Court of Session in *Allan, Stewart, and Co. v. Stein's Creditors*⁵ (1789), but on appeal to the House of Lords⁶ (1790), the judgment on this point was reversed, and stoppage *in transitu* allowed. Lord Chancellor Thurlow said: "By the law of England, and, as I conceive, by the law of Scotland also, the shipping of goods to one who commissions them, or the delivery of them to a carrier to be conveyed to him, was a completed sale. But within the last hundred years a rule has been introduced from the customs of foreign nations, that, in the case of the vendee's bankruptcy, the vendor might stop and take back the goods *in transitu*, or before they came into the hands of the vendee: and this is certainly now a part of the law of England, and I understand it to be the law likewise of

¹ *Snee v. Prescott* (1743), 1 Atk. 245, and other cases cited by Lord Abinger in his dissenting judgment in *Gibson v. Carruthers* (1841), 8 M. & W. 337 at p. 343. Lord Abinger's judgment contains an able review of the history of the doctrine.

² *Inglis v. Royal Bank (Cave's Case)* (1736), Mor. 4936.

³ Mor. 4932.

⁴ See Com., Sect. 32 *ante*, p. 159.

⁵ Mor. 4949; 3 Pat. App. pp. 192, 193.

⁶ Reported *sub nom. Jaffrey, etc. v. Allan, Stewart, and Co.*, 3 Pat. App. 191.

Scotland.”¹ This judgment had the effect of establishing the doctrine of stoppage *in transitu* as part of the law of Scotland, but for many years afterwards its nature was not fully understood. A tendency was exhibited to drive both lien and stoppage *in transitu* into conformity with the ordinary law of sale, rather than to view them as special remedies standing *per se*.² It was generally assumed that the effect of stoppage *in transitu* was to prolong the right of lien, and so prevent actual delivery to the buyer.³ To meet difficulties which suggested themselves, Bell divided constructive delivery into two kinds, viz. (1) where the goods could be stopped, and (2) where that privilege could not be exercised. In the former class he included such constructive delivery as went “no further than to forward the goods on their course towards the buyer in the charge of a middleman.”⁴ Even in the case of warehoused goods, there was, according to this theory, a kind of constructive delivery which allowed of stoppage *in transitu*, and another kind which placed the goods altogether beyond the reach of the seller.⁵ This was the state of the law as understood in

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Misconception
of the
principle.

¹ 3 Pat. App. at p. 196.

² This tendency can be traced in the works of text writers after the general fallacy was exploded in 1849. See, e.g., Ross' *Leading Cases, Com. Law* (1855), vol. ii. p. 801, and Paterson's *Compendium of English and Scotch Law* (1865), p. 189. The latter writer, referring to the law of Scotland, states that the doctrine of stoppage *in transitu* is not, as in England, an exception to the general rule. “For the general rule in the case of all contracts is that either party may withhold performance of his part of the contract if the other party refuses to perform the corresponding part.” As authority, Paterson cites *Morton v. Abercromby* (1858), 20 D. 362, but, apart from incidental *dicta*, that case gives no countenance to any distinction between the laws of Scotland and England in this respect. Paterson's conception seems to have been that, in Scotland, the seller's obligation of delivery was not performed by delivery to a carrier, but this is a manifest error. See Com., Sect. 32 *ante*, p. 160, and *Prince v. Pallat* (1880), Mor. 4932. His inference is that, in Scotland, stoppage was merely an exercise by the seller of his undivested right of property, but it was clearly a re-vesting in the seller of property which had passed from him to the buyer.

³ “The foundation of a right to stop *in transitu*, properly speaking, is the original title of property in the vendor, which is held to accompany the goods in their transit or carriage, to the effect, or for the purpose, of enabling that party to stop or withhold the actual delivery, if, from supervening facts, his safety is endangered, and he has accepted of no provision for the price.”—Per Lord Justice-Clerk Hope in *Louson v. Craik* (1842), 4 D. 1162 at p. 1167.

⁴ Bell's *Com.* i. 229-233.

⁵ Bell's error is pointed out in full editorial notes by Lord M'Laren in his edition of the *Commentaries*, vol. i. pp. 183 and 229. The effect of construc-

Sect. 44.*M'Ewen v. Smith.*

Scotland in 1847, when *M'Ewen v. Smith*¹ came up for decision. This case related to sugars in bond which, so far as the case was concerned, had never been in transit, but which were said to have been transferred by an intimated delivery order. The Court of Session negatived the claim of the alleged transferee, most of the judges founding their opinion on the seller's right to stop *in transitu*. On appeal, the House of Lords affirmed the judgment² (1849), but solely on the ground that no delivery of any kind had taken place.³

Statement of
the true
principle.

The principle of stoppage *in transitu* is thus stated by Lord President Inglis in 1867: "No law, either in England or Scotland, gives any real countenance to the idea that the state of *transitus* to which the equitable remedy of stoppage applies, is anything but an actual state of transit from the seller to the buyer. . . . The equitable remedy of stoppage is applicable only to goods which are either in the hands of a carrier, or of some person—such as a wharfinger—who is doing something to render complete the contract of carriage. To put goods in a state of *transitus* the seller must have

tive delivery is in no way different from that of actual delivery. The only question is, Has delivery of any kind taken place? If it has not, the seller's remedy is lien; if it has, the remedy, if any, is stoppage *in transitu*. See Com., Sect. 32 *ante*, p. 160.

¹ 9 D. 434.

² 6 Bell's App. 340.

³ "The simple question is whether the original vendors of these goods retained their lien upon them or not. Several of the judges in the Court below have expatiated very largely upon the doctrine of stoppage *in transitu*. My Lords, that doctrine has no more bearing upon this case than the doctrine of contingent remainders."—Per Lord Campbell, 6 Bell's App. at p. 355. In the subsequent case *Melrose v. Hastie* (1851), 13 D. 880, it was retorted in the Court of Session, that, if the Court had been misled, it was by means of English cases. Lord Fullarton said: "It appears from the judgment in the House of Lords that the term of stoppage *in transitu* was held to be inaccurate and inappropriate. All I can say is that, if it be so, it was no innovation of ours. It was freely used in the discussion in *M'Ewen's Case* for the best of all reasons that the English authorities, by which we were mainly guided in this department of mercantile law, had all treated the question under that designation." In support of this statement Lord Fullarton refers to the cases of *Hurry v. Mangles* (1808), 1 Camp. 452; *Harman v. Anderson* (1809), 2 Camp. 242; *Whitehouse v. Frost* (1810), 12 East 613; *Stoveld v. Hughes* (1811), 14 East 308; *Swanwick v. Sothorn* (1839), 9 A. & E. 895; and *Haves v. Watson* (1824), 4 B. & C. 540. "All of these," continued Lord Fullarton, "and, I believe, many others analogous to that of *M'Ewen*, were argued by the counsel, and decided by the judges, and recorded by the reporters, as cases of stoppage *in transitu* and nothing else"—13 D. at p. 896.

parted with the possession of the goods and put them into the hands of some person who is to carry, or procure them to be carried and delivered to the buyer, and the buyer must be in the position of not having received the goods. Unless the seller has parted with the possession, his remedy is not stoppage *in transitu*, but in Scotland, retention, and in England, an exercise of the seller's right of lien."¹ To adapt this statement to the existing law, it is only necessary to exclude the reference to the Scottish right of retention, which, by this Act, has now been superseded by the seller's lien.

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The right of stoppage may be exercised by the "unpaid seller" as defined in Sect. 38. It is not available to any one but a seller, or a person who stands "in the position of a seller, as for instance an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price."² It is not every person who may have held a lien over goods, who is entitled to follow them and regain possession after it has been lost. The liens of factors, bleachers, etc., have no such special privilege attached to them.³ It will be observed that, although in Sect. 45 there is frequent reference to the agent of the buyer as being entitled to put an end to stoppage *in transitu*, it is nowhere expressly stated that the *seller's* agent may enforce the stoppage where he has not a direct title as indorsee, or is not personally interested as having paid or become responsible for the price. Such a right, however, on the part of an agent exercising either special or general authority, is clearly implied. It is provided by Sect. 61 (2) that the rules relating to the law of principal and agent continue to apply to contracts for the sale of goods, and, in practice, the power of an agent in this respect is fully recognised.⁴ A different question arises if one

Right of stoppage—
by whom exercised.

Seller's agent.

¹ In *Black v. Incorporation of Bakers* (1867), 6 Macp. 136 at p. 140.

² Sect. 38 (2).

³ Benjamin, p. 847.

⁴ See, e.g., *Baxter v. Pearson* (1807), Hume 688; *Whitehead v. Anderson* (1842), 9 M. & W. 518; Blackburn on *Sale*, p. 825. "It is most salutary, and quite consistent with the principle of *negotiorum gestio*, that the person

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Unauthorised
agent—Ratifi-
cation.

Cautioner for
price.

Effect of
arrestments,
cash receipts,
and cross
accounts.

Carrier's lien.

assumes to act on behalf of the seller who has no authority whatever. The rule in England appears to be that, if the act of the party in stopping the goods is ratified before the transit is ended, by the party entitled to exercise the privilege, it will be effectual, but that ratification or adoption after the transit has ended, will be too late.¹

A cautioner for the price is not entitled to stop *in transitu*.² If, however, the cautioner has paid the price to the seller, he is entitled, according to the ordinary rule of the law of Scotland, to an assignment of the securities held by the creditor, including the right to stop the goods. The same rule was introduced into England by the English Mercantile Law Amendment Act of 1856.³

An arrestment in the hands of the carrier by a creditor of the buyer will not defeat the seller's right to stop the goods⁴; nor will a mere cash receipt granted by the buyer to a sub-vendee, not being a document of title.⁵ When there are cross accounts between seller and buyer, the right is not excluded because the seller has goods of the buyer in his hands unaccounted for, and the balance is uncertain.⁶ A decision inconsistent with this rule has been much questioned.⁷

The seller's right of stoppage *in transitu* will prevail against any lien claimed by the carrier on account of a general balance,⁸ but not for the carrier's special charges on the goods themselves.

who in general acts for a foreign merchant though he hold no special commission, should be allowed, on the sudden bankruptcy of the buyer, to apply for and obtain the necessary warrant to stop"—Bell's *Com.* i. 249. The agent can act just as effectually without a judicial warrant. Bell gives undue importance to the warrant.

¹ Stoppage effectual in *Hutchings v. Nunes* (1863), 1 Moo. P.C.C. N.S. 243, but ineffectual in *Bird v. Brown* (1850), 4 Ex. 786.

² *Louson v. Craik* (1842), 4 D. 1452; *Siffkin v. Wray* (1805), 6 East 371.

³ 19 & 20 Vict. c. 97, Sect. 5. See Benjamin, p. 846.

⁴ *Neish v. Trompowsky* (1807), Hume 693; *Dunlop v. Scott and Co.* (22nd February 1814), F.C. Similarly, in regard to an attachment in England, *Smith v. Goss* (1808), 1 Camp. 282.

⁵ *Kemp v. Falk* (1882), 7 App. Cas. 573, per Lord Blackburn at p. 584. Benjamin, p. 891 note and p. 895.

⁶ *Wood v. Jones* (1825), 7 D. & R. 126.

⁷ *Vertus v. Jewell* (1814), 4 Camp. 31. See Benjamin, p. 849.

⁸ *Oppenheim v. Russell* (1802), 3 B. & P. 42.

45.—(1.) Goods ^(a) are deemed to be in course of transit ^(b) from the time when they are delivered to a carrier ^(c) by land or water, or other bailee or custodian ^(d) for the purpose of transmission to the buyer, ^(e) until the buyer, or his agent in that behalf, ^(f) takes delivery ^(g) of them from such carrier or other bailee or custodian. ^(h)

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DURATION OF
TRANSIT.

(2.) If the buyer or his agent in that behalf ⁽ⁱ⁾ obtains delivery ^(j) of the goods before their arrival at the appointed destination, ^(k) the transit ^(l) is at an end.

(3.) If, after the arrival of the goods at the appointed destination, ^(m) the carrier or other bailee or custodian ⁽ⁿ⁾ acknowledges to the buyer, or his agent, ^(o) that he holds the goods on his behalf and continues in possession ^(p) of them as bailee or custodian for the buyer, or his agent, the transit is at an end, ^(q) and it is immaterial that a further destination ^(r) for the goods may have been indicated by the buyer.

(4.) If the goods are rejected by the buyer, ^(s) and the carrier or other bailee or custodian continues in possession of them, the transit ^(t) is not deemed to be at an end, even if the seller ^(u) has refused to receive them back. ^(v)

(5.) When goods are delivered to a ship chartered by the buyer ^(w) it is a question depending on the circumstances of the particular case, whether they are in the possession ^(x) of the master as a carrier, or as agent to the buyer.

(6.) Where the carrier or other bailee or custodian wrongfully ^(y) refuses to deliver the goods to the

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buyer, or his agent in that behalf,^(c) the transit is deemed to be at an end.

(7.) Where part delivery of the goods has been made to the buyer, or his agent in that behalf,^(c) the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession ^(a) of the whole of the goods.^(a)

NOTES.

(a) "Goods," "seller," "buyer." Defined Sect. 62 (1). "Buyer" includes a person to whom the buyer directs the goods to be sent.¹

(b) "Transit." See COM. *infra*, p. 212.

(c) "Delivered to a carrier." Delivery defined, Sect. 62 (1). Delivery to a carrier is *prima facie* delivery to the buyer, Sect. 32 (1). The definition of the course of transit here given might be made more complete by the addition of words excluding from its scope delivery to a carrier (1) where the property has not passed (see Sects. 17, 18, and 19), and (2) where the carrier is the buyer's agent to receive the goods on his behalf. See COM. *infra*, p. 212.

(d) "Bailee or custodier." Bailee, in Scotland, by interpretation, includes custodier [Sect. 62 (1)], and the word "custodier" is therefore superfluous here. If the bailee is not himself a carrier, he must at least hold the goods for some purpose connected with the contract of carriage, *e.g.* as warehouseman or wharfinger receiving the goods from one carrier, that the transit may afterwards be continued by another. A carrier who is also a warehouseman puts an end to the transit by holding the goods by instructions of the buyer for the purpose of custody and not of carriage.

(e) "Agent in that behalf." Buyer's agent includes a sub-buyer.² It probably also includes a trustee in bankruptcy (COM. *infra*, p. 216). As to seller's agent see COM., Sect. 44 *ante*, p. 207.

¹ *Ex parte Golding, Davis, and Co.* (1880), 13 Ch. D. 628, per Cotton, L. J., at p. 636; *Ex parte Miles* (1885), 15 Q.B.D. 39, per Brett, M. R., at p. 44.

² *Dixon v. Yates* (1838), 5 B. & Ad. 313.

(f) "*Takes delivery*," "*obtains delivery*." Compare Sect. 43 Sect. 45.

(1) (b) where the words are "*lawfully obtains possession*." The word "*lawfully*" was introduced into Sect. 43 in Committee, and its absence here suggests whether any kind of possession by the buyer (even forcible or fraudulent) will prevent stoppage *in transitu*. See COM. *infra*, p. 213.

(g) "*Appointed destination*," "*further destination*." See COM. *infra*, p. 218.

(h) "*Possession*" is defined in The Factors Act 1889,¹ Sect. 1 (2). No definition is attempted in this Act. As to the double meaning of constructive possession, see Sect. 39, note (i) *ante*, p. 184. As to carrier's possession, see note (i) *infra*, and COM. *infra*, p. 212.

(i) *Transit ended by carrier becoming custodian for buyer*. Mere arrival at the appointed destination does not end the transit. For this purpose the buyer must either take actual delivery, or, what is equivalent, arrange with the carrier to act as his agent for custody. But the transit is ended by any arrangement for custody to which both buyer and carrier are consenting parties. In the Scottish case of *Black v. Cassels*² (1828), goods remained at the request of the buyer in a warehouse belonging to the carrier for three months after arriving at their destination, notwithstanding which they were held liable to stoppage *in transitu*, but this is clearly bad law.³

(j) *Rejection by buyer—continued custody by carrier*. The rule of this sub-section is a corollary of Sub-sect. (3). The rejection may be in breach of contract, as where the buyer makes unfounded allegations of insufficiency, or it may arise from a desire to save the seller from unnecessary loss through the buyer's impending bankruptcy. As to rejection by the buyer on the ground of insolvency, see COM. *infra*, p. 219.

(k) *Seller's refusal to receive back*. The supposition is that the seller at first insists upon the buyer implementing the contract by taking delivery, and that the carrier cannot get relieved of the goods at either end of the transit. While, however, the goods are in this position, the seller loses confidence in the buyer's solvency and avails himself of the remedy.⁴

(l) "*Ship chartered by the buyer*." Where the ship is the buyer's property, the master is usually the buyer's agent to take complete or unconditional delivery. There is therefore no transit

¹ 52 & 53 Vict. c. 45.

² 6 Sh. 894.

³ See *Strachan v. Knox and Co.'s Trustees* (21st January 1817), F.C.

⁴ *Bolton v. Lane and Forks Ry. Co.* (1866), L.R. 1 C.P. 431; *James v. Griffin* (1837), 2 M. & W. 623.

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in the sense of the Act. As to a chartered ship see *COM. infra*, p. 213.

(m) "*Wrongfully.*" See note (f) *supra* and *COM. infra*, p. 213. In *Dunlop v. Scott and Co.*¹ (1814) a question was raised as to the effect of a refusal by the carrier to deliver to the buyer in consequence of an arrestment by a creditor of the buyer. The answer seems supplied by this sub-section. The refusal being *wrongful*,² the transit is deemed to be at an end. This result was reached in somewhat similar circumstances in England, in *Bird v. Brown*³ (1850).

(n) *Part delivery—Stoppage of remainder.* See *COM. infra*, p. 222.

COMMENTARY.

Definition of
transitus.

The *transitus*, in the words of Lord Blackburn, is "whilst the goods are on their passage from the vendor to the buyer, or when they are in the hands of one who neither holds the possession by a contract of bailment made with the vendor, nor yet as an agent to hold them under the order of the buyer, but only as an agent to forward them from the vendor to the buyer."⁴

Relation of
carrier to
parties.

The carrier may stand relatively to the parties in one or other of three different positions: (1) he may hold for the seller, as where, in virtue of a suspensive condition or a reservation of the *jus disponendi*, the property in the goods has not passed to the buyer⁵; (2) he may hold for the buyer, as where the buyer has obtained both property and possession before the commencement of the transit or where the carrier is the buyer's agent for the receipt of the goods; (3) he may hold for the sole purpose of transmission to the buyer, the property having passed and the carrier not being the seller's agent. It is only to the last of these that stoppage *in transitu* applies. The circumstances connected with the actual conveyance may

¹ 22nd February 1814, F.C.

² See *COM.*, Sect. 44 *ante*, p. 208; *Bell's Com.* i. 231, note.

³ 4 Ex. 786.

⁴ Blackburn on *Sale*, p. 351.

⁵ *Bell's Com.* i. 230; *Watt v. Findlay* (1846), 8 D. 529; *Hall and Sons v. Scott* (1860), 22 D. 413; *Linn v. Shields* (1863), 2 Macp. 88. The sale itself may be incomplete, as in *Wallace, Gardyn, and Co. v. Miller* (1766), Mor. 8475, Hailes 27.

be the same in each case, but the nature of the carrier's possession is different.¹ **Sect. 45.**

The primary difficulty in connection with the duration of the transit is to fix its termination; in other words, to ascertain the precise conditions under which the buyer or his agent will acquire such possession as will defeat the seller's right. Among the considerations which must weigh in such an enquiry, is the effect to be given to possession acquired by force or fraud. The Act provides that "the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to *contracts* for the sale of goods"² [Sect. 61 (2)], but this provision is apparently limited to the constitution of the contract, and, even were it otherwise, the common-law effect of force and fraud upon stoppage *in transitu* is neither well defined nor altogether consistent. Thus, divergent opinions have been expressed as to the legal effect where the buyer forcibly or fraudulently obtains delivery before the arrival of the goods at their appointed destination [Subsect. (2)]. In other words, granting that the buyer may anticipate the end of the transit, can he do so without the carrier's consent? On the one hand we have the following judgment of the Court in *Whitehead v. Anderson*³ (1842). "If the vendee take the goods out of the possession of the carrier into his own before their arrival, *with or without the consent of the carrier*, there seems to be no doubt that the transit would be at an end; though, in the case of the absence of the carrier's consent, it may be a wrong to him for which he would have a right of action."⁴ On the other hand, Lord Blackburn says: "Notwithstanding the expression of the Exchequer in *Whitehead v. Anderson*, it is submitted that it is doubtful whether, when the carrier has a

Termination
of transit.

Effect of force
or fraud.

¹ "Stoppage *in transitu* is called into existence for the vendor's benefit after the buyer has acquired title and *right* of possession and even constructive possession, but not yet actual possession"—Benjamin, p. 853. As to the various meanings of "*possession*," in this connection see Sect. 39, note (i) *ante*, p. 184.

² These words were added during the progress of the bill through Parliament.

³ 9 M. & W. 518.

⁴ Per Parke, B., 9 M. & W. at p. 534.

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right to refuse to allow the vendee to take even constructive possession, the vendee can improve his position by a tortious taking of actual possession against the will of the carrier. The law in general discountenances violence, and it would seem not consistent with its general policy to give a man a benefit, in consequence of his forcible or fraudulent wrong against a third party.”¹

Effect of fraud
upon delivery
in Scotland.

The effect given to fraud in questions of delivery of possession in Scotland has been very marked. Before stoppage *in transitu* was recognised, there was a legal presumption of fraud in all cases where the buyer's insolvency supervened shortly after he had obtained delivery without payment of the price. It was felt, however, that some limit must be placed upon this presumption, and accordingly, in *Inglis v. Royal Bank (Cave's Case)*² (1736), the rule *intra triduum* was established, under which insolvency had no effect upon the possession unless it supervened within three days of delivery. This rule was overturned by the House of Lords in *Allan, Stewart, and Co. v. Stein's Creditors*³ (1790), by which judgment stoppage *in transitu* became part of the law of Scotland. Lord Thurlow in that case said: “I cannot perceive that the Court have ever proceeded on that positive rule which the sellers have contended to be now fixed law. It is rather my opinion, from the examination of those cases, that the Court had considered the failure within three days as *one* circumstance only from which fraud might be presumed, but not as that from which, singly, fraud was to be absolutely inferred, though other circumstances might show there was none. In the present case . . . the buyers failing within three days after the transaction, or after the receipt of the goods, was not *per se* sufficient to avoid the contract.”⁴ It is to be noticed that it was the *English* remedy of stoppage *in transitu* which the House of Lords substituted for the rule

Rule *intra*
triduum.

Effect of
stoppage *in*
transitu upon
Scots law as to
fraud.

Does Scottish
rule differ
from that of
England?

¹ Blackburn on *Sale*, p. 375. See also Benjamin, pp. 878 *et seq.*

² Mor. 4937. See also *Shepherd v. Campbell and Robertson* (1775), Hailes 637, H. of L. (1776), 2 Pat. App. 399; and Bankton, i. 10. 117.

³ Mor. 4949, 3 Pat. App. 191 (*sub nom. Jaffrey v. Allan, Stewart, and Co.*).

⁴ 3 Pat. App. at p. 196.

intra triduum, and that there was nothing in the principles of the law of sale in Scotland to prevent stoppage, as known and practised in England, from being adopted in its entirety. No difference in regard to the passing of the property could affect it, for in Scotland, as well as in England, the property passed to the buyer, in the ordinary case, by delivery to the carrier at the beginning of the transit. But the Scottish Courts, while admitting stoppage *in transitu*, rejected the English limitation, which would not allow the buyer's creditors to be deprived of their debtor's goods because of alleged fraud on the part of the debtor in taking delivery. In stoppage *in transitu* the seller is allowed a special and anomalous privilege, which, on the English theory, must take the place of any presumed fraud of the debtor. The very foundation of stoppage implies that the buyer is taking possession of *his own* goods, not those of the seller, for if the property has not already passed to the buyer, there is no occasion for the remedy.¹ If the carrier is not the buyer's agent to take delivery, but is agent for the seller to give delivery, then a fraudulent taking possession by the buyer from the carrier might well be subject to reduction, but, in such case, there is no room for stoppage *in transitu*. In this light, many of the Scottish cases of stoppage *in transitu* subsequent to that of *Allan, Stewart, and Co.* will not bear close examination. There is an admixture of the old principle of presumed fraud with the new remedy of stoppage, which is entirely unwarranted. Thus in *Schuurmans and Sons v. Goldie*² (1828), the seller was allowed to stop *in transitu* after the buyer's creditors had obtained possession of the goods, on the ground that the buyer in sending out circulars to his creditors announcing his intention to stop payment, had not sent one to the agent of the seller of the goods. Lord Alloway said: "If the law of England and Scotland could be reconciled, it would be very desirable. The law

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Confusion of principles in Scottish cases.

Schuurmans and Sons v. Goldie.

¹ "If the seller has despatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transitu*. Why? Because the property is vested in the buyer."—Per Bayley, J., in *Bloxam v. Sanders* (1825), 4 B. & C. 941 at p. 949.

² 6 Sh. 1110.

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merchant should, if possible, be the same over the world. But there is a very serious difference on the point under discussion between the law of England and that of Scotland. From a very early period the English Courts adopted the principle that wherever the subject sold has come into the possession of the bankrupt, though after an act of bankruptcy, it falls into the general fund. This Court has followed a different principle, on the ground of fraud, founded on the Roman law, and recognised everywhere but in England. . . . Supposing the agent for the foreign seller had received the bankrupt's circular on the 4th of January, was it not his duty to apply immediately to stop *in transitu*? But the bankrupt took care he should not receive any such letter. Then, if this party (the seller's agent) had a right to stop the goods, could the bankrupt avail himself of his own fraud by which stoppage was prevented? This Court has never countenanced such a fraud; and the knowledge of bankruptcy is clearly brought home to the bankrupt here."¹

Does bankruptcy in Scotland, *ipso facto*, operate stoppage?

The judgment above quoted seems to suggest that, in Scotland, bankruptcy, *ipso facto*, operates a stoppage *in transitu*. If this be so, a trustee for creditors in Scotland cannot take possession of goods so as to end the transit and prevent the seller from exercising his remedy. This view will be found in many of the Scottish cases, and Bell, writing in 1826, says "the opinion seems to be growing stronger."² Bell doubts "whether, laying aside the inexpediency of having opposite rules in England and Scotland, there be any clear principle for supporting a determination opposite to that which has been followed in England."³ Bankruptcy, he says, "does not annul a previous contract. If the seller choose, he may insist on the bankrupt or the creditors taking the goods and allowing him to claim under

¹ 6 Sh. at p. 1113.

² Bell's *Com.* (5th edition), i. 227; Bell's *Prin.*, Sect. 1309. The case of *Brown v. Watson* (1816), Hume 707, founded on by Bell (*Prin.*, Sect. 1309), was one of incomplete delivery, and the soundness of the judgment is (at least in part) doubted by Hume who reports it.

³ As to the law of England see *Ellis v. Hunt* (1781) 3 T.R. 464; *Scott v. Pettit* (1803), 3 B. & P. 469, and other cases cited in Bell's *Com.* (7th edition), i. 247, notes.

the contract. If the creditors choose, they may pay the price and take the goods. . . . The bankruptcy cannot be a countermand otherwise than by presumption that, if the seller had known of this event, he would have recalled the goods, an inference which is far from unavoidable, for the vendor may have chosen to act differently. As to restitution, supposing the delivery once made, there seems to be no ground for it in this, more than in a hundred other cases which occur in bankruptcy."¹ But the question, even as to Scotland, seems settled by authority. In the very case which introduced stoppage *in transitu* into Scotland, the question was stated by Lord Thurlow to be "whether the vendors were entitled to stop certain quantities of grain which were consigned or forwarded by them to Stein, the bankrupt, before the actual delivery to him, *the bankruptcy having intervened*."² The interlocutor of the House allowed the sellers to produce "evidence to show that they were entitled to stop and detain the grain consigned by them to the bankrupt *in transitu*, or before *actual delivery*."³ If bankruptcy had been *ipso facto* a stoppage, it was unnecessary to found upon a stoppage by the sellers.⁴

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Effect on this question of *Allan, Stewart, and Co.'s Case*.

On the general question as to what acts of the buyer will be sufficient to change the possession, Parke, B., states the law thus: "The unpaid vendor has a right to retake the goods before they have arrived at *the destination originally contemplated by the purchaser*, unless in the meantime they

Nature of buyer's possession which will defeat stoppage.

¹ Bell's *Com.* i. 248.

² In *Allan, Stewart, and Co. v. Stein's Creditors* (1790), *sub nom. Jaffrey v. Allan, Stewart, and Co.*, 3 Pat. App. 191 at p. 196.

³ Pat. App. at p. 197.

⁴ Brodie says: "As it is a settled point in England that bankruptcy does not prevent the consignee from taking actual possession to the same effect as if he were solvent, it is a necessary and settled consequence that actual possession may to the same purpose be competently taken by his assignees under a commission of bankruptcy. If, then, the English authorities are henceforth to be received by us on this point, it will follow that in the event either of a private trust or of a sequestration, the trustee in the latter case may, as substituted in the place of the bankrupt or insolvent, take actual possession prior to stoppage by the consignor and thus prevent it."—Brodie's *Stair*, p. 884. In the earlier Scottish cases the true principle seems to have been better understood. See, e.g., *Sinclair and Williamson's Creditors v. Robertson and Aitken* (1801), Mor. App. Sale 3. M. P. Brown, writing in 1821, treats it as settled law in England that bankruptcy does not operate a stoppage, but thinks the question doubtful in Scotland (*Sale*, p. 537).

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come to the actual or constructive possession of the vendee. . . . The case of the vendee taking the goods out of the possession of the carrier before their arrival is one of *actual* possession. A case of *constructive* possession is where the carrier enters, expressly or by implication, into a new agreement distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character for the purpose of custody on his account, and subject to some new or further order to be given to him. It appears to us very doubtful whether an act of marking or taking samples or the like, without any removal from the possession of the carrier, though done with the intention to take possession, would amount to a constructive possession, unless accompanied with such circumstances as to denote that the carrier was intended to keep, and assented to keep, the goods in the nature of an agent for custody. . . . Unless by contract with the captain, express or implied, the relation in which he stood before, as a mere instrument of conveyance to an appointed place of destination, was altered, and he became the agent of the consignee for a new purpose, there was no constructive possession on the part of the vendee.”¹

“Appointed destination”—
“further destination.”

The words “*appointed destination*” in sub-sections (2) and (3) are significant. It is sometimes assumed that where the goods are not in transit towards the buyer but “away from him” to some other destination, there is no room for stoppage *in transitu*. If, however, the destination is appointed in the contract itself or by the original instructions of the buyer, the goods may be stopped before they reach that destination, just as effectually as if the transit were towards the buyer himself.² “The destination,” says Cave, J., “may be fixed by the contract of sale or by directions given by the purchaser to the vendor. But, however fixed, the transit is at an end when the goods have got into

¹ In *Whitehead v. Anderson* (1842), 9 M. & W. 518 at pp. 534, 535.

² See *M'Leod v. Harrison* (1880), 8 Ret. 227.

the hands of some one who holds them for the purchaser, and for some other purpose than that of merely carrying them to the destination fixed by the contract or by the directions given by the purchaser to the vendor.”¹ The distinction between “*appointed destination*” and “*further destination*,” both of which phrases occur in Sub-sect. (3), is illustrated by the following remarks of Lord Esher, M. R.—“There has,” he says, “been a difficulty in some cases where the question was whether the original transit was at an end and a fresh transit had begun. The way in which that question has been dealt with is this: where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists; but if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are *in transitu* afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone. So, also, if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at an end when they have reached that place, and any further transit is a fresh and independent transit.”²

Sub-section (4) deals with rejection by the buyer. It is well established in Scotland that a buyer, clearly insolvent, and resolved upon suspending payment, is entitled to reject goods offered for delivery,³ and where the property has not already passed to him, he is *bound* to reject, otherwise the effect of delivery may be set aside on the ground of fraud.⁴ The buyer may even take the goods into his

Rejection by
the buyer in
Scotland.

¹ In *Bethell v. Clark* (1887), 19 Q.B.D. 553 at p. 561; Affd. by Ct. of App. (1888), 20 Q.B.D. 615.

² In *Bethell v. Clark* (1888), 20 Q.B.D. 615 at p. 617. See also *Dixon v. Baldwin* (1804), 5 East 175; *Coates v. Railton* (1827), 6 B. & C. 422; *Whitehead v. Anderson* (1842), 9 M. & W. 518; *Kendal v. Marshall, Stevens, and Co.* (1883), 11 Q.B.D. 356; *Ex parte Miles* (1885), 19 Q.B.D. 39.—Blackburn, pp. 369, 370; Benjamin, pp. 867 *et seq.*

³ Bell's *Com.* i. 253.

⁴ See cases in App. II. III. (7). This is altogether apart from the question previously discussed, as to whether acceptance of delivery by an insolvent or

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In England.

warehouse *custodiæ causa*, without such temporary custody having the effect of delivery, or preventing the seller from exercising his right of stoppage.¹ The result is practically the same in England. Thus in *James v. Griffin*² (1837), the buyer, being urged by the shipmaster to land the goods in order to set the vessel free, sent his son to attend to the unloading at the wharf where he usually received such goods. At the same time he told his son that, being insolvent, he did not intend to take delivery. It was held that the conversation between father and son was competent evidence of the father's intention, and that the transit was not ended.³ "The question," says Benjamin, "now always

bankrupt buyer can be deemed fraudulent to the effect of continuing the seller's right of stoppage *in transitu*. Stoppage is a remedy *per se*, and is founded on the fact that, while the property has passed to the buyer, the only possession yet obtained by him has been through an agent for transmission.

¹ *Drake v. M'Millan* (1807), Hume 691; *Stein v. Hutchison* (16th November 1810), F.C.; *Brown v. Watson* (1816), Hume 709; *Inglis v. Pt. Eglington Spinning Co.* (1842), 4 D. 478; *Booker and Co. v. Milne* (1870), 9 Macp. 314—Bell's *Com.* i. 230. Brodie, whose criticism is acute and valuable, though often marred by over-elaboration and a tendency to self-assertion, seems in this instance to carry the principle of stoppage *in transitu* to an unnecessarily rigid extreme. Writing in 1831, he says: "Though we have merely adopted from our neighbours, and that recently too, the doctrine of stopping *in transitu*, there has been a strange disposition here to carry it farther than has ever been done in England. It has not only been strongly insinuated that it would be a fraudulent and therefore reducible act in [an insolvent or bankrupt] consignee to terminate the transit by his interference, but it has been held that he is, without any agreement with the consignor to that purpose, or any measure calculated to rescind the contract or divest himself of the property, entitled to interpose directly for the consignor in the way of undertaking the custody for him, and thus to accomplish the object of stoppage in that person's favour. Surely, such a judgment is totally irreconcilable with the doctrine of stoppage *in transitu*. Such an act by the consignee himself could not have the effect of divesting him, and how the proprietor of goods could undertake the custody of them for another, I cannot conceive"—Brodie's *Stair*, p. 884. Brodie attacks the cases of *Drake v. M'Millan* and *Stein v. Hutchison* and says: "Lord President Blair seems never to have understood the doctrine of stoppage *in transitu*." The critic, however, forgets that the doctrine itself is founded on the anomaly of a consignor withdrawing delivery after it has been given, and that there is nothing to prevent an equitable extension of this anomaly. Lord M'Laren seems to support Brodie's view, in so far as he doubts whether, in *Drake v. M'Millan*, "there was any sufficient rejection."—Bell's *Com.* i. 256, note. The question, it is submitted, rather turns upon whether the buyer ever accepted the goods. If he never accepted them on his own behalf, and, on the contrary, expressly repudiated such acceptance, he must necessarily be held in law to have rejected them.

² 2 M. & W. 623.

³ Compare this case with *Drake v. M'Millan* (1807), Hume 691, where the insolvent buyer, who resided at a distance from the port of delivery, instructed a law agent on the spot to arrange for delivery and custody "for

turns upon the point whether (1) the buyer has left anything undone for the perfect transfer of the *property* to himself, in which case, the sale being incomplete, he may honestly decline to complete it to the prejudice of the vendor, or (2) whether, although the transfer of the property be complete, the transit into his *possession* remains incomplete, in which event he may honestly refuse the possession so as to leave to his vendor the right of stoppage *in transitu*, which will be equally available to the latter if he can accomplish it before the assignees get possession of the goods."¹ To this it may be added that mere custody by the buyer or his agent does not seem to involve possession in the character of owner, if there is clear evidence that such custody was intended for a different purpose, such as the preservation of the goods, or the setting free of the vessel.²

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After sequestration, the buyer has no power to reject,³ and if the goods are delivered into the bankrupt's stock before stoppage, the right is defeated.⁴ It is immaterial whether the bankrupt accepts or merely stands aside; if he accepts, he does so as the agent of his general creditors. It follows that, after the bankrupt is divested of his estate and loses the power of rejection, he has no power to refuse delivery or to prolong the transit for the benefit of the seller by taking the goods *custodiæ causa*.⁵

Sequestrated bankrupt has no power to reject.

Mere notice of an intention to stop the goods, given by

the benefit of all concerned." The agent's instructions were held evidence of the buyer's intention, and the seller was consequently preferred to the buyer's creditors.

¹ Benjamin, p. 486.

² "If the possessor of the goods has the intention to hold them for the buyer, and not as an agent to forward, and the buyer intends the possessor so to hold them for him, the *transitus* is at an end, but I apprehend that both these intents must concur"—Blackburn, p. 364. See *Strachan v. Knox and Co.'s Trustee* (21st January 1817), F.C.

³ Bell says "this has been held with expressions of regret."—Bell's *Com.* i. 255.

⁴ *Hamilton v. Barrow and Reynolds* (1767), Bell's *Com.* i. 255, note.

⁵ In *Sinclair and Williamson's Creditors v. Robertson and Aiken* (1801), Mor. App. Sale 3, one of the judges said: "The intimation to the bankrupts is nothing; they could not interfere. They could have no right to refuse the goods had they been brought to them for delivery." This *dictum* is reported by Bell (*Com.* i. 250, note), who was one of the counsel in the case. It does not appear in the Faculty Report or in Morrison.

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Effect of notice
of intention
to stop.

the seller to the creditors or the trustee of an insolvent or bankrupt buyer, will not prolong the transit, or prevent acceptance on the termination of the transit.¹ In order to protect himself the seller must take the steps set forth in Sect. 46.²

Ship chartered
by buyer.

Where a ship for conveying the goods is chartered by the buyer [Sub-sect. (5)], much depends upon the nature of the charter-party. If the ship has been "demised" so that the master is the servant of the charterer, it is practically the buyer's ship, but if the subject of hire is merely the exclusive use of the vessel, and the master remains the servant of the shipowner, he is an independent person, and the goods may be stopped. It is, however, a question of intention in every case.³

Part delivery
—stoppage of
remainder.

The rule of Sub-sect. (7) corresponds with that of Sect. 42. Part delivery does not affect the seller's rights of lien or stoppage *in transitu* over the remainder of the goods unless it is so intended.⁴ It was even held in *Crawshay v. Eades*⁵ (1823), that although part of the goods had been landed on the purchaser's wharf, the *transitus* was not ended as to these goods, because it was not the carrier's intention to give possession to the buyer.⁶ The English cases as to part delivery are collected in a note to Benjamin [p. 800,

¹ Bell's *Com.* i. 249.

² "The seller must take some active step for resuming the possession"—Bell's *Com.* i. 250. "Here the seller was not vigilant: he did not get the goods into his possession; he suffered creditors to arrest, and the goods to come into public custody for the benefit of the arresting creditors."—Per Lord Meadowbank in *Fotheringham v. Somerville and Co.* (26th May 1809), F.C.

³ *Robertson v. Mors* (1801), Mor. App. Sale, No. 3; *Baxter v. Pearson* (1807), Hume 688; *Drake v. M'Millan* (1807), Hume 691; *Neish v. Trompousky and Co.* (1807), Hume 693; *Turner v. Trustees of Liverpool Docks* (1851), 6 Ex. 543; *Schotsman v. L. and Y. Ry. Co.* (1867), 2 Ch. App. 332; *Bernadson v. Strang* (1867), L.R. 4 Eq. 481 (1868), 3 Ch. App. 588; *Ex parte Rosevear China Clay Co.* (1879), 11 Ch. Div. 560; *In re Bruno, Silva, and Son* (1887), 56 L.T. N.S. 577—Bell's *Prin.*, Sect. 1308; Benjamin, pp. 856 *et seq.* *Baxter v. Pearson* is considered by M'Laren to be an unsound decision—Bell's *Com.* i. 233, note. See as to goods shipped in a general ship in the buyer's name—*M'Leod and Co. v. Harrison* (1880), 8 Ret. 227. The statement in Bell's *Prin.* (Sect. 1308) is subject to qualification.

⁴ *Melrose v. Hastie* (1851), 13 D. 880, 14 D. 268.

⁵ 1 B. & C. 181.

⁶ Compare this case with *Collins v. Marquis' Creditors* (1804), Mor. 14223, and *Robertson and Aitken v. Mors* (1801), Mor. App. Sale, No. 3.

note (u)], from which cases the editors of the fourth edition¹ deduce the following rule:—"It rests with the party who relies on the part delivery as a constructive delivery of the whole, to prove the intention to make it operate as a delivery of the whole. This proof may be established (1) from the circumstances under which the delivery took place, *e.g.* the purchaser may at the time express his intention to take the whole of the goods, although he actually takes only a part; or (2) perhaps, in some cases, from the intrinsic nature of the goods delivered, as *e.g.* where the cargo consists of an entire machine, and an essential portion of it is delivered to the purchaser.² Further, where the shipowner or carrier has not been paid in full his freight or charges, there is a strong presumption that he intends to retain his lien, and part delivery will not operate as a constructive delivery of the whole, unless it can be shown that the shipowner or carrier assented to the buyer's taking possession of the goods without payment of freight or charges."³

As, in lien, the seller's privilege is merely that of detention of the goods in security of the price, so, in stoppage *in transitu*, the right cannot be exercised in respect of freight, insurance, or other expenses or damages.⁴ Bell indeed goes further, and, founding on a *dictum* of Lord Thurlow, he suggests that, "as the title to stop *in transitu* arises from a voidance of the contract,⁵ and the act of stopping puts

Effect of stoppage on seller's rights. Claims for carriage, insurance, and damages.

¹ Messrs A. B. Pearson-Gee and H. F. Boyd.

² *Ex parte Cooper* (1879), 11 Ch. Div. 68. In *Girdwood and Co. v. Pollock and Co.* (1827), 5 Sh. 507, the question was raised but not decided, whether delivery of part of a machine which a manufacturer was employed to make, and for which a bill had been granted, transferred the property of the part.

³ Brodie questions the Scottish case of *Collins v. Marquis' Creditors* (1804), Mor. 14223, on the ground that it is inconsistent with the rule in England whence stoppage *in transitu* is derived, but his notion of the English law on this subject is not founded on decision, but on an *a priori* view of what it is, or ought to be. See Brodie's *Stair*, p. 883 and note.

⁴ On the other hand, the seller is not liable for a premium of insurance from which he derives no benefit—*Smith and Jamieson v. Drake* (9th March 1809), F.C.

⁵ The contract may be rescinded without necessarily excluding a claim for damages at the instance of one of the parties as, *e.g.*, under Sect. 43 (4), but in the ordinary case the contract is not rescinded [Sect. 43 (1)]. The tendency of Scottish decisions was to hold the contract void. See *Kincaid v. Murray and Henderson* (1798) as reported in Bell's *Com.* i. 253, note, and cited

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things into the same situation between the vendor and vendee as if there never had been any transaction between them relative to the goods so stopped, the stopper can raise no charge against the bankrupt's estate respecting such goods, though the contract had in part been fulfilled by carrying them so far, or insuring them."¹ This, however, was not law in Scotland even before this Act,² and it is clearly inconsistent with Sect. 48.

Sect. 46.

HOW STOPPAGE
IN TRANSITU
IS EFFECTED.

46.—(1.) The unpaid seller^(a) may exercise his right^(b) of stoppage in transitu either by taking actual possession^(c) of the goods, or by giving notice^(d) of his claim to the carrier or other bailee or custodian^(e) in whose possession the goods are.^(f) Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.^(g)

(2.) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodian^(e) in possession of the goods, he must re-

sub nom. Murray and Henderson v. Kincaid (1796) in *Sinclair and Williamson's Creditors v. Robertson and Aitken* (1801), Mor. App. Sale 3.

¹ Bell's *Com.* i. 253. See also Bell's *Com.* i. 250 *et seq.* The opinion attributed by Bell to Lord Thurlow is said by him to have been expressed in *Allan, Stewart, and Co.'s Case*, but no remark of that description is to be found in the ordinary report. Elsewhere, Bell informed his readers that he had much communication with Lord Thurlow after the decision (*Com.* i. 223), in reference to which statement, Brodie brusquely remarked that it seemed "pretty evident from the learned commentator's misconception of the English law of sale, that he could not derive the just benefit from those communications."—Brodie's *Stair*, p. 865, note.

² See *Stoppel and Co. v. Stoddart* (1850), 13 D. 61.

deliver the goods to, or according to the directions of, Sect. 46. the seller.^(a) The expenses of such re-delivery must be borne by the seller.^(b)

NOTES.

(a) "*Unpaid seller.*" Defined Sect. 38.

(b) "*May exercise his right.*" This phrase is permissive, and suggests that there are other modes of stoppage *in transitu* not here specified. Thus, service upon the carrier of an action of interdict [note (d) *infra*], and, possibly, also, an arrestment in the hands of the carrier following upon an action by the seller against the buyer, would sufficiently certiorate the carrier of the seller's intention to exercise his right of stoppage. By contrast, where notice is given to a principal as provided in the latter part of the sub-section, the word "*must*" is used. So also in Sub-sect. (2) the carrier *must* re-deliver, and the expenses *must* be borne by the seller.

(c) "*Actual possession.*" "The vendor has a right if unpaid, and if the vendee be insolvent, to retake the goods . . . and thereby to replace himself in the same situation as if he had not parted with the actual possession."¹

(d) "*Notice.*" No specific form or solemnity is necessary.² Bell says "the most unquestionable stoppage is by the warrant of a judge,"³ but such warrant, though formerly often applied for in Scotland, is quite unnecessary. In *Robertson v. More*⁴ (1801) the notice was given verbally to the shipmaster by a partner of the seller's firm, and the report bears that "nearly the whole Court were of opinion that, the shipmaster being the custodier for behoof of both parties, private intimation to him was effectual." If, however, judicial proceedings at the instance of the seller are served upon the shipmaster or the principal custodier, the intention to stop will be sufficiently intimated.⁵

¹ Per Parke, B., in *James v. Griffin* (1836), 2 M. & W. 623 at p. 632.

² Bell's *Com.* i. 248; Benjamin, p. 882.

³ Bell's *Com.* i. 249.

⁴ Mor. App. Sale 3.

⁵ In *Stoppel and Co. v. Stoddart* (1850), 13 D. 61, the seller raised a suspension and interdict to prevent "the captain of the vessel delivering the cargo either to the buyer or to any person on his account or behoof." Appearance was entered by an indorsee of the bill of lading, but the indorsation being afterwards reduced as a fraudulent preference under the Act 1696 c. 5, the interdict was held an effectual stoppage, and the seller was preferred to the buyer's trustee in bankruptcy.

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In England, the seller has a remedy by injunction,¹ and, on the same principle, an interdict is competent in Scotland.²

(e) “*Bailee*’ in Scotland includes custodian” [Sect. 62 (1)]. See Sect. 45, note (d), *ante*, p. 210.

(f) *Carrier in possession*. Possession by a carrier is sometimes called “*constructive delivery*” to the buyer.³ Delivery to the carrier is *prima facie* delivery to the buyer [Sect. 32 (1)].

(g) *Notice to principal not having actual custody*. “To make a notice effective as a stoppage *in transitu*, it must be given to the person who has the immediate custody of the goods, or, if given to the principal whose servant has the custody, it must be given at such a time and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee. . . . The only duty that can be imposed on the absent principal is to use reasonable diligence to prevent the delivery.”⁴

(h) *Re-delivery to the seller*. In the case of *The Tigress*⁵ (1863) it was determined by Dr. Lushington that the seller has a right to demand re-delivery to himself, and that the carrier has no right to say that he will retain the goods for delivery to the true owner after the conflicting claims have been settled. It is not a matter ordinarily within the seller’s cognisance whether or not the buyer has indorsed the bill of lading. The seller “exercises his right of stoppage at his own peril, and it is incumbent on the master to give effect to a claim as soon as he is satisfied it is made by the vendor, unless he is aware of a legal defeasance of the vendor’s claim.”⁶ If the carrier is in real doubt he will in

¹ *Schotsman v. L. and Y. Ry. Co.* (1867), 2 Ch. 332 at p. 340.

² *Stoppel and Co. v. Stoddart and Co.* (1850), 13 D 61. In *Morton and Co. v. Abercromby* (1858), 20 D. 362, the sellers applied for interdict to prevent the ship sailing with their goods on board. The service on the shipowner would, no doubt, have been a good stoppage had the right existed. In *Booker and Co. v. Milne* (1870), 9 Macp. 314, goods rejected by an insolvent buyer, and lying on the quay where they had been landed, were stopped by the seller by means of an application for interdict and warrant to take possession.

³ “The delivery by the vendor of goods sold to a carrier of any description, either expressly or by implication named by the vendee, and who is to carry on his account, is a *constructive delivery* to the vendee.”—Per Parke, B., in *James v. Griffin* (1836), 2 M. & W. 623 at p. 632.

⁴ Per Parke, B., in *Whitehead v. Anderson* (1842), 9 M. & W. 518 at pp. 533, 534. In *Ex parte Falk* (1880), 14 Ch. Div. 446, doubt was expressed by Bramwell, L. J., as to the obligation of a principal to send notice of stoppage to his agent [14 Ch. Div. at p. 455], and, in the same case, James, L. J., said regarding *Whitehead v. Anderson*, that it was not a judicial decision that any such duty is imposed on the shipowner [14 Ch. Div. at p. 450]. But, on the case going to the House of Lords, Lord Blackburn expressed a strong opinion in favour of the law as now laid down in this section—*Kemp v. Falk* (1882), 7 App. Cas. 573 at p. 585.

⁵ 32 L.J. Adm. 97.

⁶ 32 L.J. Adm. at p. 101.

England, resort to an interpleader,¹ and in Scotland, to the analogous remedy of a multiplepoinding.² **Sect. 46.**

(i) *Expenses of re-delivery.* This provision was added in Committee. The carrier will probably have a lien for these expenses, as well as for his charges under the original contract of carriage. The question, however, is not free from difficulty.

Re-sale by Buyer or Seller.

47. Subject to the provisions of this Act,^(a) the unpaid seller's^(b) right of lien or retention^(c) or stoppage in transitu is not affected by any sale, or other disposition^(d) of the goods which the buyer may have made, unless the seller has assented thereto.^(e) **Sect. 47.**

EFFECT OF
SUB-SALE OR
PLEDGE BY
BUYER.

Provided that where a document of title^(f) to goods has been lawfully transferred^(g) to any person as buyer or owner^(h) of the goods, and that person transfers the document to a person who takes the document in good faith⁽ⁱ⁾ and for valuable consideration,^(j) then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value,^(k) the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.^(l)

NOTES.

(a) "*Provisions of this Act.*" *E.g.* Sect. 25 (2).

(b) "*Unpaid seller.*" Defined Sect. 38.

(c) "*Lien or retention.*" "'Lien' in Scotland includes right

¹ "The master may sometimes suffer for an innocent mistake, but he can always protect himself from liability by filing a bill of interpleader in Chancery."—Per Dr. Lushington in *The Tigress*, 32 L.J. Adm. at p. 102.

² In Scotland "plaintiff" includes "claimant in a multiplepoinding," and "action" includes "condescendence and claim" [Sect. 62 (1)].

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of retention" [Sect. 62 (1)]. If retention has not the same meaning as lien, an important change in the law of Scotland is involved. See COM., Sect. 39 *ante*, p. 186.

(d) "*Sale or other disposition*" by buyer. The buyer cannot enter into a sub-sale so as to give the sub-buyer a title free from the unpaid seller's remedies, unless by means of a document of title in terms of the proviso attached to the section.¹ As to pledge or other disposition for value, see notes (k) and (l) *infra*.

(e) "*Unless the seller has assented thereto*." The consent of the seller amounts to a waiver of his remedies. See *Fleming v. Smith and Co.*² (1881), and COM., Sect. 41 *ante*, p. 195.³

(f) "'Document of title' has the same meaning as it has in the Factors Acts"⁴ [Sect. 62 (1)]. See COM., Sect. 25 *ante*, p. 125. A collection of Scottish cases is contained in Appendix II. *rv. post*, p. 331.

(g) "*Lawfully transferred*." A "document of title" as defined by reference [see note (f) *supra*] differs from a bill or note in respect that the title of the holder depends on the title of the assignor, and is not inherent in the instrument itself. The holder of a stolen "document of title" cannot give a good title to an assignee, even if the latter acts *bonâ fide* and has given valuable consideration. Perhaps the word "*lawfully*" has reference to this fact. See COM., Sect. 25 *ante*, p. 126.

(h) "*Buyer or owner*." The right thus liable to be defeated is one in favour of an "unpaid seller" (Sect. 38) and operates against a buyer. The word "*owner*" may refer to one in the position of a buyer, such as an agent buying on his own credit. See Sect. 38 (2).

(i) "*In good faith*." Defined Sect. 62 (2). If the buyer knows the transferor to be insolvent, the transfer will be ineffectual, but mere knowledge that the price is unpaid is not inconsistent with "good faith," because credit is a usual incident in mercantile dealings.

(j) "*Valuable consideration*." In Scotland, the transfer may be reduced as a fraudulent preference, if granted to a creditor in satisfaction of a prior debt.⁵ Such a transfer would apparently be effectual in England.⁶

¹ *M'Ewen and Co. v. Smiths* (1847), 9 D. 434; *Affid. H. of L.* (1849), 6 Bell's App. 340. ² 8 Ret. 548.

³ See also the English cases *Stoveld v. Hughes* (1811), 14 East 308 (express assent of seller); and *Pearson v. Dawson* (1858), E.B. & E. 448 (implied assent). ⁴ 52 & 53 Vict. c. 45, and 53 & 54 Vict. c. 40.

⁵ *Stoppel v. Stoddart* (1850), 13 D. 61; *Adamson, Howie, and Co. v. Guild* (1868), 6 Macp. 347.

⁶ *Leask v. Scott* (1877), 2 Q.B.D. 376. An opposite decision was given in *Rodger v. Comptoir d'Escompte* (1868), L.R. 2 P.C. 393, before the

(k) "*Pledge or other disposition for value.*" The general provisions of the Act do not apply to "a transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security" [Sect. 61 (4).] Sect. 47.

(l) "*Rights of the transferee.*" "The vendor's right of stoppage will remain, so far as to entitle him to any surplus proceeds after satisfying the creditors to whom the bill of lading was transferred as security, and the vendor will have the further equitable right of insisting on marshalling the assets; that is to say, of forcing the creditor to exhaust any other securities held by him, towards satisfying his claim, before proceeding on the goods of the unpaid vendor."¹ In Scotland, the transferee of a bill of lading who has other securities, is a catholic creditor, and cannot capriciously injure the secondary creditor (the seller) by claiming his whole debt out of the goods, leaving the other securities free, or only liable for the balance.² In *Kemp v. Falk*³ (1882) the House of Lords had under consideration whether, in the case of a sub-sale, stoppage *in transitu* could be made available against the purchase money payable to the intermediate seller. The case *Ex parte Golding, Davis, and Co.*⁴ (1880) seemed to favour this view, but it was unnecessary in *Kemp v. Falk* to decide the point. Lords Blackburn and Watson refrained from offering any opinion, but Lord Selborne said: "I assent entirely to the proposition that *where the sub-purchasers get a good title as against the right of stoppage in transitu*, there can be no stoppage as against the purchase money payable by them." In *Ex parte Golding and Co.'s Case* the bill of lading had not been effectually transferred, and therefore the decision, apart from the *dicta*, does not conflict with Lord Selborne's opinion.⁵ The provision of this section that the seller's right is "*defeated*" seems to follow on the lines of Lord Selborne's judgment.

48.—(1.) Subject to the provisions of this section, Sect. 48.
a contract of sale is not rescinded^(a) by the mere
exercise by an unpaid seller^(b) of his right of lien or
retention or stoppage *in transitu*.^(c)

SALE NOT
GENERALLY
RESCINDED
BY LIEN OR
STOPPAGE IN
TRANSITU.

Judicial Committee of the Privy Council, but decisions before that Committee, though entitled to great weight, are not binding on the English Courts.

¹ Benjamin, p. 892. *Re Westzanthus* (1833), 5 B. & Ad. 817; *Spalding v. Ruding* (1843), 6 Beav. 376. The principle was approved and adopted in *Kemp v. Falk* (1882), 7 App. Cas. 573.

² See Bell's *Com.* ii. 418.

⁴ 13 Ch. D. 628.

³ 7 App. Cas. 573.

⁵ See Benjamin, p. 893 *et seq.*

Sect. 48.

(2.) Where an unpaid seller^(b) who has exercised his right of lien or retention or stoppage in transitu re-sells the goods, the buyer acquires a good title thereto as against the original buyer.^(a)

(3.) Where the goods are of a perishable nature,^(c) or where the unpaid seller^(b) gives notice^(c) to the buyer of his intention to re-sell, and the buyer does not within a reasonable time^(c) pay or tender^(a) the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.^(a)

(4.) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.^(a)

NOTES.

(a) *Sale not rescinded.* See COM., *infra*, p. 231.

(b) "*Unpaid seller.*" Defined Sect. 38.

(c) "*Lien or retention or stoppage in transitu.*" See Sects. 39 and 41 to 46. As to "retention" see COM., Sect. 39 *ante*, p. 186.

(d) *The second buyer from an unpaid seller acquires a good title.* The same result may be reached under Sect. 25 (1), but, under that section, the second buyer must act in good faith and without notice, and must have received delivery of the goods. No such conditions are here prescribed, but on the other hand, the operation of the present section seems confined to cases where the original buyer is in default, while Sect. 25 is general in its application. A seller who re-sells after unwarrantably stopping the goods *in transitu* or otherwise acting in breach of the contract, cannot confer a good title upon a second buyer under the present section,¹ but he may do so under Sect. 25, subject to

¹ See, e.g., *Cohen v. Foster* (1892), 61 L.J. Q.B. 643.

the conditions of that section. In the one case, it is a privilege accorded to a *bona-fide* second buyer irrespective of the position or default of the original seller [Sect. 25 (1)]; in the other, it is right vested, under certain conditions, in the original seller, of which any second buyer from him obtains the benefit [Sect. 39 (1) (c) as qualified by Sub-sect. (3) of the present section].

(e) *Goods of a perishable nature.* "It is admitted that perishable articles may be resold. It is difficult to say what may be considered as perishable articles, and what not."¹ In *Maclean v. Dunn*² (1828) the rule as to re-sale was extended to articles whether perishable or not, on the ground that "in that respect there is no difference between one commodity and another." In the words of Best, C. J., "it is a practice founded on good sense to make a re-sale of a disputed article, and to hold the original contractor responsible for the difference."³ No definition of "perishable" is given in the Act.

(f) *Notice.* No special form is provided or required. Any reasonable notice will be sufficient.⁴

(g) "*Reasonable time*" is a question of fact (Sect. 56).

(h) "*Pay or tender.*" See Sect. 41, note (e) *ante*, p. 191.

(i) *Recovery of damages.* As to the measure of damages see Sect. 50.

(k) *Reservation of right of re-sale.* See COM. *infra*, p. 232.

COMMENTARY.

Under the former law of Scotland questions as to re-selling the goods and rescinding the contract could only arise in connection with stoppage *in transitu*. Previous to the commencement of the *transitus* by delivery to the carrier, the seller, being undivested owner, could do what he pleased with his own. In the event of his breach of contract, the buyer became liable in damages without any right to control the disposal of goods over which he never had any right of property. In a purely personal contract, a breach by one party could not operate rescission in the

Re-selling goods and rescinding contract under former law of Scotland.

¹ Per Best, C. J., in *Maclean v. Dunn* (1828), 4 Bing. 722 at p. 728.

² 4 Bing. 722.

³ 4 Bing. at p. 728.

⁴ *Maclean v. Dunn* (*supra*). See also *Jacques, Serruys, and Co. v. Watt* (12th February 1817), F.C. "If the re-sale was conducted by the vendor in a fair and reasonable manner, the original purchaser who was in default would have no right to complain."—Blackburn on *Sale*, p. 446.

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sense of freeing both parties from obligation, but freed the party not in fault, and left his remedy against the other unimpaired.

Uncertainty in law of Scotland after introduction of stoppage *in transitu*.

But, after the doctrine of stoppage *in transitu* had been imported from England into Scotland, great uncertainty prevailed as to the footing on which the seller held the goods when they had been returned into his possession after the stoppage. In England, he could only hold them by a right analogous to his former lien for the price, but in Scotland, the seller's former right being one of ownership, it was doubted whether on regaining possession he became re-invested in that right, or whether he held the goods on the same footing as the seller in England. The conclusion generally arrived at was that the seller was replaced in the position he would have occupied had he never parted with the goods, and thus stoppage *in transitu* came to have a much more powerful effect in Scotland than in England whence the right was derived.¹

Under former law, contract not rescinded.

Neither in Scotland nor in England was the contract rescinded by the buyer's default,² unless rescission was expressly stipulated, and therefore the *dictum* referred to in connection with Sect. 45³ as attributed by Bell to Lord Thurlow in *Allan, Stewart, and Co.'s Case*⁴ was not law before this Act, and is clearly inconsistent with this section.

Effect of express power to re-sell.

Where the contract expressly stipulates a power to re-sell, the sale is rescinded, but not to the effect of totally setting it aside so as to prevent any claim against the buyer in respect of his breach. The effect upon the buyer's right of this species of rescission may, however, be very important. "He runs all the risk of re-sale without any

¹ See M. P. Brown on *Sale*, p. 441; Benjamin on *Sale*, pp. 898 *et seq.*

² As to Scotland, see *Stoppel and Co. v. Stoddart* (1850), 13 D. 61; *Adamson, Howie, and Co. v. Guild* (1868), 6 Macp. 347, per Lord Barcaple at p. 354. But see *Booker and Co. v. Milne* (1870), 9 Macp. 314, where the sale was said to have been rescinded by the seller. The question at issue did not involve any ranking for damages upon the bankrupt buyer's estate, and probably it was not intended by the so-called rescission to exclude such a claim. As to England see Blackburn, p. 484; Benjamin, p. 898.

³ *Ante*, p. 223.

⁴ In House of Lords *sub nom. Jaffrey v. Allan, Stewart, and Co.* (1790), 3 Pat. App. 191. See Bell's *Com.* i. 250, 251.

chance of profit, for he has clearly no right to the surplus **Sect. 48.**
if the goods are sold for a higher price."¹

It is not necessary to obtain a judicial warrant for the
re-sale,² though Bell suggests that such is the "correct
course."³ Judicial
warrant.

¹ Benjamin, p. 796. The converse is thus shown:—"If goods are sold for £500, and after being stopped *in transitu* become worth £1000 by a rise in the market, the vendor must deliver them to the vendee or his creditors upon receiving the £500" (M. P. Brown, p. 441). If the sale is rescinded this profit goes to the seller.

² See *Hain v. Laing and Sons* (1853), 15 D. 667. In many cases where a judicial warrant had been obtained, the Court treated the fact as unimportant, e.g. *Warin and Craven v. Forrester* (1876), 4 Ret. 190; *Affid.* (1877) 4 Ret. H.L. 75.

³ Bell on *Sale*, p. 109. Bell had not the benefit of the later decisions.

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

Sect. 49.

ACTION FOR PRICE.

49.—(1.) Where, under a contract of sale,^(a) the property in the goods has passed to the buyer,^(b) and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract,^(c) the seller may maintain an action ^(d) against him for the price of the goods.^(e)

(2.) Where, under a contract of sale,^(a) the price is payable on a day certain irrespective of delivery,^(c) and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed,^(b) and the goods have not been appropriated to the contract.^(e)

(3.) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.^(a)

NOTES.

(a) "*Contract of sale.*" Defined Sects. 1 and 62 (1).

(b) "*Property passed to buyer.*" See Sects. 17 and 18.

(c) *Buyer's failure to pay price.* See Sects. 27 and 28. The refusal to pay must be "*wrongful*." The mere fact of the property having passed will not give the seller a right of immediate action for the price, unless, under the express or implied terms of the contract, the price is immediately payable.

(d) "*Action*" includes counterclaim and set off, and in Scotland condescendence and claim and compensation." Sect. 62 (1).

(e) *Right of action.* See also Sect. 57.

(f) "*Day certain irrespective of delivery.*" See COM., *infra*, p. 236.

(g) "*Appropriated to the contract.*" See Sect. 18, Rule 5, and COM., *ante*, p. 95.

(h) "*Interest on the price.*" Sects. 54 and 61 (2) seem to reserve the seller's right to interest in Scotland, thus rendering this provision superfluous. See COM., *infra*, p. 236.

COMMENTARY.

Under this and the following section the seller's remedies in Scotland are somewhat altered. Formerly, in the event of a breach by the buyer, the seller had in every case alternative remedies; (1) he might sue for the price provided he continued in a position to offer the goods,¹ or (2) he might retain the goods and claim damages, subject to an obligation to lessen the damage by a re-sale where a market was available.² But under the Act where the property has not

Seller's remedies in Scotland altered.

¹ Bell's *Com.* i. 472. Substituted goods, though of the same quality, will not do—*Thomson Brors. v. Thomson* (1885), 13 Ret. 88.

² The obligation to re-sell has been strangely misunderstood. Thus in *Thomson Brothers v. Thomson* (1885), 13 Ret. 88, the Sheriff-Substitute found that the seller had not the alternative remedy of an action for the price, and that re-sale and damages was his only remedy. This view was founded on *Warin and Craven v. Forrester* (1876), 4 Ret. 190, *Affid.* (1877), 4 Ret. H.L. 75, where Lord President Inglis said: "Re-sale is the only proper remedy for parties in the position of the pursuer to adopt." But in *Warin's Case* there was no question of an action for the price, and the Lord President's remark applied only to the seller's obligation as stated in the text. The Sheriff-Substitute's judgment in the case of *Thomson Brothers* was not supported by the Court. Another instance of misapprehension of the principle of the seller's remedy in Scotland prior to this Act, is furnished by the Sheriff Court case *Cuthill v. M'Lachlan* (1874), Guthrie's Sel. Cas. 1st ser. 520, where the seller's rights as undivested owner were entirely lost sight of, and his position was treated as analogous to that of a buyer having the custody of rejected goods. No such analogy existed, for, in the case of the buyer, the goods were clearly not his property, and he merely held them as involuntary custodian or bailee for the seller. See as to the alteration in the seller's duty of custody in Scotland COM., Sect. 37 *ante*, p. 177.

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passed, and where the price is not payable upon a day certain irrespective of delivery, the seller is restricted to a claim of damages.

Comparison
between
Scottish and
English law.

The difference between the English law as embodied in the Act and the former law of Scotland, is to a certain extent lessened by the fact that in Scotland, it was necessary to an action for the price of goods to be manufactured or acquired that the goods themselves should be ready for delivery,¹ while in England, the goods in such circumstances were, and are, often appropriated to the buyer so as to pass the property and permit of an action for the price (Sect. 18, Rule 5). In England, however, the buyer's consent, express or implied, is necessary to the appropriation, while in Scotland the seller could sue for the price without such consent.

Price payable
on a fixed
day.

Under sub-section (2) the seller can sue for the price even although the property has not passed, if it is part of the contract that the price be paid on a fixed day. "A vendor may well say to a buyer, 'I want the money on such a day, and I will not sell unless you agree to give me the money on that day, whether you are ready or not to accept the goods'; and if these terms be accepted, the vendor may recover the whole price of goods the property of which remains vested in himself. In such a case the buyer would be driven to his cross action, if the vendor after receiving the price should refuse delivery of the goods."²

Interest on
the price in
Scotland.

Sub-section (3) reserves the seller's right in Scotland to recover interest on the price, but Sect. 54, taken in connection with the reservation of the rules of the common law contained in Sect. 61 (2), practically does the same thing. The sub-section therefore seems unnecessary.

English law as
to interest.

In England, interest is not recoverable on the price of goods sold,³ but if the contract is in writing, and if the price is a "debt or sum certain payable at a certain

¹ Where the buyer refused to take delivery, the fact that the seller afterwards pledged the goods to a third party in security of a temporary advance, was held no bar to an action at his instance for the price, he being in a position to redeem them and to give delivery at any time—*Athya and Co. v. Rowell and Co.* (1856), 18 D. 1299, per Lord Justice-Clerk Hope at p. 1300.

² Benjamin, p. 761. See *Dunlop v. Grole* (1845), 2 C. & K. 158.

³ *Mayna on Damages*, 5th ed. p. 162.

time," interest may be allowed under 3 & 4 William IV. c. 42, Sect. 28. In *Duncombe v. Brighton Club*¹ (1875) the price was payable "one third in cash, and bills at six and twelve months for balance." It was held by a majority of the Court that "one third in cash" was a sufficient specification under the Act to allow of interest from the date of the goods being delivered. Lord Blackburn dissented from this judgment, but, on the general question, he said: "I confess that it seems to me in reason and common sense, that if the money for goods sold and delivered is not paid at the proper time, it should be paid with interest, but the rule at common law did not give interest in such a case."²

In Scotland, the seller can always sue for the price and interest from the date when the money should have been paid. This proceeds on implied agreement on the part of the person in default to pay for the use of the money held by him in breach of his contract.³ Among the Scottish rules as to the commencement of interest, the following are stated by Bell:—"(1) Where there is an express agreement concerning the commencement of interest, it rules the case. (2) Otherwise, in the general case, interest runs from the stipulated day of payment. (3) Where the day of payment is optional, interest runs only from the day ascertained by the act declaring the option. . . . (8) Interest on merchants' accounts of furnishings begins on the expiration of the accustomed credit; or if there be no special custom to regulate it, from the date of citation when the money should have been paid."⁴

Rules as to
interest in
Scotland.

50.—(1.) Where the buyer wrongfully neglects or refuses to accept and pay^(a) for the goods, the seller may maintain an action^(b) against him for damages for non-acceptance.

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DAMAGES FOR
NON-ACCEPT-
ANCE.

¹ L.R. 10 Q.B. 371.

² L.R. 10 Q.B. at p. 374.

³ M. P. Brown on *Sale*, p. 348; Bell's *Prin.*, Sect. 32; Bell's *Com.* i. 692; 2nd Report of *Mer. Law Com.* 1855, p. 47.

⁴ Bell's *Com.* i. 694.

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(2.) The measure of damages^(a) is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3.) Where there is an available market^(d) for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted,^(e) or, if no time was fixed for acceptance, then at the time of the refusal to accept.^(f)

NOTES.

(a) "*Accept and pay.*" See Sect. 27 note (b), *ante*, p. 129. The general duties of the buyer in performance of the contract are contained in Part III. of the Act, Sects. 27 to 37 inclusive.

(b) "*Action*" includes in Scotland condescendence and claim and compensation [Sect. 62 (1)]. See also Sect. 57.

(c) "*Measure of damages.*" See COM., *infra*, p. 239.

(d) "*Available market.*" See remarks of James, L. J., in *Dunkirk Hill Colliery Co. v. Lever*¹ (1878).

(e) "*Time or times fixed for acceptance.*" As to instalment deliveries see Sect. 31 *ante*, p. 147. The measure of damages will be fixed as at the date when the goods or instalments thereof are deliverable, not as at the date of a refusal by the buyer to accept, if these respective dates do not correspond. But see COM., Sect. 51 *post*, p. 248.

(f) "*Difference between contract price and market price.*" See COM., *infra*, p. 239.

COMMENTARY.

Seller's rights
of action.

Where the property has passed, the seller has the option of an action for the price under Sect. 49, or an action for damages under this section. Where the property has not

¹ 9 Ch. Div. 20 at p. 25.

passed, the seller is confined to an action of damages, except in the special case provided for in Sect. 49 (2). **Sect. 50.**

Sub-section (2) is practically the first part of the well-known rule laid down in *Hadley v. Baxendale*¹ (1854), where Alderson, B., said: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as arising naturally, *i.e.* according to the usual course of things, from such breach of contract itself."² **Rule of *Hadley v. Baxendale* (first part).**

The sub-section is the rule as to *general* damages, but it has often been departed from in circumstances giving rise to what are known in England as *special* damages. Action for such special damages is reserved by Sect. 54.³ **General and special damages.**

In Scotland, general damages have not hitherto been distinguished from special damages. The latter phrase covers, at least in part, the Scottish rule, which is said to have been that all the circumstances of the case must be considered.⁴ The alleged rule in the law of Scotland went further, and on the authority of *Dunlop v. Higgins*⁵ (1848) it was laid down that the damage must be estimated without reference to the price of the article at any particular time. This is clearly inconsistent with Sub-sect. (3) and with the provisions of Sects. 51 (3) and 53 (3). But even before this Act, the rule of *Dunlop v. Higgins* had ceased to be of universal application, and in *Warin and Craven v. Forrester*⁶ (1877) the English principle was adopted by the Court of Session and sustained by the House of Lords. **Scottish rule as to damages.**

Dunlop v. Higgins.

Its authority ignored in Scotland.

There may be damages in certain cases of intended sale, **Damages in respect of inchoate sale.**

¹ 9 Ex. 341.

² 9 Ex. at p. 354. The second part of the rule covers the case of special damages, and is quoted Sect. 54, note (b) *post*, p. 256. The whole rule is in substance the rule of the Roman law. See M. P. Brown on *Sale*, p. 217.

³ As to special damages see *Hydraulic Engineering Co. v. M'Haffie* (1878), 4 Q.B.D. 670; *Hammond v. Bussey* (1887), 20 Q.B.D. 79. See also Sect. 54, note (b) *post*, p. 256.

⁴ See *Watt v. Mitchell* (1839), 1 D. 1157, strongly approved by the House of Lords in *Dunlop v. Higgins* (1848), 6 Bell's App. Cas. 195, and supported by Lord President M'Neill in *Baird v. Reilly* (1856), 18 D. 734 at p. 737.

⁵ 6 Bell's App. Cas. 195.—See specially, judgment of Lord Cottenham at p. 211.

⁶ 4 Ret. 190, Affd. 4 Ret. H.L. 75.

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though the circumstances never amounted to an actual contract enforceable by law, as in *Allans v. Gilchrist*¹ (1875) and other cases there referred to.

Deposit of
purchase price.

Where a sum is deposited by the purchaser as part of the purchase price, it will depend upon the terms of the special contract whether, in the event of his failure to pay the balance, the sum deposited is to be taken as liquidated damages in lieu of performance, so as to preclude any enquiry into the actual damage.²

Seller's remedy
corresponds
with that of
buyer.

The seller's remedy against the buyer under this section corresponds with the buyer's remedy under Sect. 51 in the event of a breach by the seller. The general characteristics of the remedy are identical in each case.³ See COM., Sect. 51 *post*, p. 241.

Remedies of the Buyer.

Sect. 51.

DAMAGES
FOR NON-
DELIVERY.

51.—(1.) Where the seller wrongfully^(a) neglects or refuses to deliver^(b) the goods to the buyer, the buyer may maintain an action^(c) against the seller for damages for non-delivery.^(d)

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.^(e)

(3.) Where there is an available market^(f) for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the

¹ 2 Ret. 587. See specially opinion of Lord Deas at p. 590, and the cases of *Walker v. Milne* (1823), 3 Sh. 379; *Bell v. Bell* (1841), 3 D. 1201; *Heddie v. Baikie* (1846), 8 D. 376.

² In *Commercial Bank v. Beal* (1890), 18 Ret. 80, the seller was held entitled to retain the full deposit money, though it amounted to a considerable sum.

³ A buyer of timber from a merchant in Russia, being unable to implement his contract, sent the timber back and offered to pay damages "*as valued*." The measure of damages was held to include the difference of exchange between St. Petersburg and London.—*M'Leans v. Thorley, etc.* (1797), H.L. 4 Pat. App. 22.

contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.^(g) **Sect. 51.**

NOTES.

(a) "*Wrongfully.*" The seller may have a good answer to the buyer's claim for implement.

(b) "*Refuses to deliver.*" The rules as to delivery are contained in Part III. of the Act, Sects. 27 to 37 inclusive.

(c) "*Maintain an action.*" If the property has passed, the buyer has alternative remedies (1) for damages under this section; (2) for recovery of the goods¹ (in England called an action of trover); (3) for specific implement or performance under Sect. 52. If the property has not passed, his remedy is confined to damages under this section.

(d) "*Non-delivery.*" In Scotland, if the buyer rejects goods as disconform to contract [Sect. 11 (2)], his remedy is under this section, there being a neglect or refusal on the part of the seller to deliver the *contract* goods. In England, where there is no similar right of rejection, the buyer's remedy is under Sect. 53. Where the seller delays delivery, but the goods are ultimately delivered and accepted, the measure of the buyer's damages will be the difference between the value of the goods when delivery was due, and their value when actually delivered.

(e) "*Measure of damages.*" This provision is the same as that in the case of the buyer's breach [Sect. 50 (2)].

(f) "*Available market.*" See note (d), Sect. 50 *ante*, p. 238.

(g) "*Time of the refusal to deliver.*" See COM. *infra*.

COMMENTARY.

The terms of this section are the same as those of section 50, substituting "seller" for "buyer," and "failure to deliver" for "failure to accept." The section represents the *buyer's* remedy in damages for non-delivery, just as section 50 represents the *seller's* remedy in damages for non-acceptance. Where the damage arises, not from non-

Corresponding remedies of buyer and seller.

¹ See Sect. 57 which authorises enforcement of any right by action.

Sect. 51.

Rejection
equivalent to
non-delivery.

delivery, but from a breach by the seller of some condition or warranty not entitling the buyer to reject, the remedy is specified in section 53, but, as the buyer in Scotland has a right of rejection not known in England, his remedy, where such right is exercised, falls under the present section. It is a case of non-delivery by the seller of goods *answering to the contract*.

Buyer's alter-
native
remedies.

As the seller has, in certain circumstances, the alternative remedies of action for the price or for damages, so it may be open to the buyer to proceed alternatively by way of a demand for specific performance¹ or of a claim for damages as here set forth. In Scotland, where two or more courses are open, it is competent to combine the alternative claims in one action.²

Former law
of Scotland.

The rule of this section was practically applied in the old Scottish case of *Paterson v. Keith*³ (1745), where, in a sale of wheat, the Court restricted the buyer's claim to the difference between the price in his contract, and the current price at the time and place of delivery together with the expenses of the action. The buyer unsuccessfully claimed (1) the loss on a re-sale at an advanced price, (2) damages paid to the sub-buyer, and (3) the expenses of defending an action at the instance of the sub-buyer.⁴ In numerous other cases, however, a rule was adopted in Scotland altogether inconsistent with this section, and especially with sub-section (3). It seems to have been founded on the view that the seller continued under obligation to deliver till the buyer chose to give up that claim by raising action for damages,⁵ and that there was consequently no obligation on the buyer to minimise the damage. But, even

Scottish rule
inconsistent
with section.

¹ Sect. 52.

² "There are three kinds of conclusions for damages: first, a conclusion for damages over and above performance, in respect of injury to the subject or loss by delay. A second is for damage in place of delivery. But there is a third which is alternative, and occurs in a summons demanding either performance of a contract, or damages for breach of it."—Per Lord President Inglis in *Linn v. Shields* (1863), 2 Macp. 88 at p. 93.

³ Elchies, *Dam. and Int.* No. 2.

⁴ See also opinion of Lord President Blair in *Robinson and Co. v. M'Culloch* (23rd December 1808), F.C.

⁵ So argued and sustained in *Taylor and Co. v. Morrison* (17th June 1809), F.C.

on this footing, the decisions were not uniform either as to the time or the mode of estimating the damage. Sometimes the damage was estimated at the highest selling price between the date when delivery should have been made and the date of giving judgment in the action¹; sometimes the *terminus ad quem* was the date of bringing the seller into Court²—a difference in date which, in a rising market, might be of considerable importance to the buyer.³

In *Taylor and Co. v. Morrison*⁴ (1809) the contract was for spirits to be delivered “in the course of three weeks,” at the end of which period the price was not much higher than the contract price, but it soon afterwards rose considerably. The buyers, who were retail spirit dealers, made no specific purchase in lieu of the supply contracted for, but they alleged that they had purchased an equal quantity of spirits beyond what they otherwise would have been obliged to purchase. They contended that they had a right, if they chose, to claim the difference between the contract price and the highest price they had at any time paid between the date of the breach and the date of the action, but they restricted their claim to an average of the monthly prices during that period. The seller contended for a rule such as is now laid down by this section. It was admitted, he argued, that a fall in the price of the article would not affect the claim of damages, but there was exactly the same reason, why a rise should not affect it, viz. that the claim was constituted before the rise took place. The rule contended for by the buyers would produce the greatest uncertainty and contradiction. If such a rule were given effect to, the amount of the damage would depend upon the time of bringing the action, so that two persons who suffered

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Decisions not uniform.

Taylor v. Morrison.

¹ As in *Boswall v. Morrison* (1806), Mor. App. Damages No. 1, Affd. H. of L. (1812), 5 Pat. App. 649; and *Shirra and Mains v. Harvie and Co.* (1807), 15 F.C. 329, note. Hume reports *Boswall's Case* under date 1801, which is clearly an error—*Decisions*, p. 679.

² As in *Taylor and Co. v. Morrison* (1809), 15 F.C. 326, but it is suggested by the reporter of this case that the date of bringing the action was fixed, because the buyer had chosen so to limit his claim, 15 Fac. Col. 329, note.

³ Stair would give a discretion to the Judge in this matter, it being his province “to ponder all circumstances, and accordingly modify the value as at the time of dittay or citation, litiscontestation or sentence.”—Stair, i. 17. 16.

⁴ 15 F.C. 326.

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precisely the same wrong, might recover very different damages. It would be put into the power of the buyer to wait as long as he pleased in order to get a higher average by a rise. This argument, however, did not weigh with the Court, who sustained the buyer's claim to the full extent.

*Robinson v.
M'Culloch.*

On the other hand, in *Robinson and Co. v. M'Culloch*¹ (1808), there was a continuing contract for the supply of oats and barley over a period of seven months, during which time, in face of a progressively rising market, less than half the contract quantity had been delivered. The average price during the period was much higher than the contract price, and the price on the last day was much higher than the average price. The buyer claimed that the price should be taken as on the last day of the term allowed for delivery, but the Court took the average price of the whole term as if an equal quantity had been delivered in each month. Lord President Blair's argument seems altogether on the lines of the present section. "The measure of damages," he said, "is the value of actual implement of the bargain. If the value had been for delivery at any particular period, the value of the grain *at that period* ought to have been taken as the value of implement." The Court are said to have concurred in the Lord President's view, but it is difficult to reconcile the argument with the subsequent decision of the same Division in *Taylor and Co. v. Morrison*² (1809) above referred to.

*Anderson v.
Goddart.*

The principle of estimating the damage according to the market value at the time and place of delivery, was acknowledged in *Anderson v. Goddard and Co.*³ (1809), but, as in terms of the contract the buyer was to send a ship to Leith (the place of delivery) to convey the cargo (grain) to Beaulieu, he was allowed the market price at Beaulieu at the time

¹ (23rd December 1808), F.C.

² 15 F.C. 326. The reporter suggests that in *Robinson and Co.'s Case* the Court were influenced by the fact that little or no blame attached to the seller in connection with his breach of contract. It is to be observed, however, that the Lord President went out of his way to lay down a general principle, and further, that reasonable indemnification to the party not in fault is the foundation of a civil action on breach of contract, and not the penal apportionment of blame.

³ (21st February 1809), F.C.

when in ordinary course the vessel would have arrived there, and also the expense incurred in consequence of the vessel having been detained at Leith a greater number of days than would have been necessary had the contract been implemented.¹

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It was mentioned in connection with the preceding section² that the principle laid down in *Watt v. Mitchell*³ (1839) and *Dunlop v. Higgins*⁴ (1848) differs from the rule of this section,⁵ but the foregoing review of the older Scottish cases shows that the supposed rule of the law of Scotland has not been uniformly applied. Some of the more recent cases in Scotland arose out of rejection by the buyer of goods offered for delivery in circumstances which in England, would not have entitled the buyer to reject; but both in England and Scotland, the basis of damage was non-delivery, and on English principles the remedy should have been found in the rule of this section. Accordingly, notwithstanding *Dunlop v. Higgins*, we find that the English rule has been applied, or at least assumed to be binding, in Scotland before this Act. Thus in *Duff and Co. v. Iron, etc., Buildings Co.*⁶ (1891) it seems to have been admitted that, if there had been an available market in which similar goods could have been bought, the difference between the current price in such market and the contract price would have formed the measure of the buyer's damage. The following remarks of Lord M'Laren are instructive: "In such cases the rule which is most usually applied is that the damage is the difference between the contract price and the market price at the time when the breach of contract is ascertained, that

Rule of
Dunlop v.
Higgins not
adhered to in
Scotland.

Duff v. Iron
Buildings Co.

Opinion of
Lord M'Laren.

¹ Consequential (or, perhaps, it may be called special) damage was allowed in *Strachan v. Paton* (1824), 3 Sh. 259 (N.E. 184) (insufficient repair of a ship); and in *Dickson v. Henderson* (1849), 12 D. 306 (sale of shares), but these were not cases falling under this Act.

² Com., Sect. 50 *ante*, p. 239.

³ 1 D. 1157.

⁴ 6 Bell's App. 195.

⁵ The rule of *Dunlop v. Higgins* was followed in *Baird v. Reilly* (1856), 18 D. 734, where Lord President M'Neill said in reference to a bill of exceptions: "The judge is asked to lay down absolutely that, in this case, the pursuers are not entitled to further damages than the difference between the contract price and that at which the grain could be purchased in the market at the time when delivery was asked and refused. . . . I cannot acquiesce in that. The rule is untenable in point of law, and is also in itself dangerous and unsound"—18 D. at p. 737.

⁶ 19 Ret. 199.

Sect. 51.

Purchaser for
re-sale does not
lose profit.

Duty of
purchaser
to minimise
loss.

Assessment
of loss when
no market
standard.

Basis on which
loss estimated.

is, generally, on the arrival and examination of the goods. This rule certainly presupposes that a purchaser for re-sale is not to lose his profit on the adventure, because if he acts upon the rule, that is, if he supplies himself with goods at the market price of the day, he is able to make the same profit on the substituted goods that he would have made on the goods to be supplied under the contract, only his profit is paid to him in two portions, so much by the sub-vendee, and the balance by the seller who is liable in damages. The principle seems to be this, that the first purchaser has a duty to do what is within his power to lessen the loss to the seller by replacing the goods at the current price of the day,¹ and that if he fails in doing so, he will only recover from the seller the same sum which the seller would have had to pay in case the purchaser had supplied himself elsewhere. . . . It was contended that there was no precedent for assessing the damages otherwise than by a reference to market price as the standard of value, but, plainly, where there is no such standard, the damage must be ascertained in some other way, so that the seller shall be put to indemnify the purchaser against such inconvenience as the parties might necessarily foresee or contemplate as the result of a failure of duty on the part of the seller.² In the present case the huts were in the maker's knowledge sent to South Africa for re-sale. . . . If huts could have been obtained in the colony at wholesale prices, it would have been the pursuers' duty to supply themselves so as to lessen the loss to the defenders, but as this could not be done, the consequence is that the whole loss must fall on the defenders. That loss is, of course, the commercial profit which the pursuers have been prevented from making on that part of their capital which is locked up in the defenders' hands. . . . I should not be disposed to allow more than ordinary commercial profit, even if it were clearly proved that, in the

¹ It is the duty of the buyer to act as a reasonable man in the ordinary course of business. See *Wilson v. Hicks* (1857), 26 L.J. Ex. 242; *Dunkirk Hill Colliery Co. v. Lever* (1878), 9 Ch. Div. 20.—Per James, L. J., at p. 25.

² This would form in England a case of *special damage* under the second branch of the rule in *Hadley v. Baxendale* (1854), 9 Ex. 341 at p. 354. See Sect. 54, note (b) *post*, p. 256.

circumstances of the place of shipment, larger profits might have been made, because ordinary commercial profit represents the loss which the seller contemplates or ought to contemplate as the result of his negligence, and according to the opinions expressed in *Hadley v. Baxendale* and cognate cases, this is the measure of the seller's liability." ¹ **Sect. 51.**

The same principle was recognised in the Outer House in *Gunter and Co. v. Lauritzen* ² (1894), where Danish hay and straw offered for delivery was held to have been properly rejected as disconform to contract. The seller contended that at certain ports in Scotland, such hay could have been bought under contract price, and that it was the buyer's duty to have purchased. Lord Stormonth Darling in giving judgment admitted the rule, but held that "the goods in question were of a very special kind, and that at Aberdeen, which was the port of delivery, there was not a market for these goods at the time. The defender had led evidence to show that, by hunting all over the country, the pursuers might have found out that there were small parcels of Danish hay and straw at Leith and other places, which he might have picked up by private treaty; but none of these parcels were on public offer at the time, or quoted in any public market list which was open to the pursuers' inspection. In these circumstances, there was no duty on the purchaser to make extraordinary exertions to supply himself with goods elsewhere." ³

*Gunter v.
Lauritzen.*

Purchaser not bound to make extraordinary exertions to obtain supply.

Where the contract stipulates for delivery at a future

¹ 19 Ret. at pp. 204, 205. Loss of profit was allowed as part of the buyer's damages in *Taysen and Co. v. Johnsen* (1872), 9 S.L.R. 229. Among English cases of damages where there was no available market, see *Grébert Borgnis v. Nugent* (1885), 15 Q.B.D. 85, particularly remarks of Brett, M. R., at p. 89, and Bowen, L. J., at p. 93. The English rule is fully borne out by the remarks of Lord M'Laren above quoted. It is not loss of profit as such for which, in the general case, damages are recoverable by the buyer. The price on a re-sale is merely a means of ascertaining the value of the goods. There may be cases where loss may be directly recoverable as special damage under Sect. 54, but such loss will not include consequential damages arising from the buyer having entered into another contract to supply a larger quantity, of which the goods bought were intended to form part.—*Dunlop v. M'Kellar* (31st May 1815), F.C.

² 31 S.L.R. 359.

³ 31 S.L.R. at p. 360. Where it is the seller who seeks the remedy, the rule is the same (Sect. 50), and in like manner it has been recognised in Scotland before this Act. See *Warin and Craven v. Forrester* (1876), 4 Ret. 190, Affd. (1877), 4 Ret. H.L. 75. See also Com., Sect. 50 *ante*, p. 239.

Sect. 51.

Intimation of intention not to implement contract.

Damages claimed before obligation prestatable.

time, and, before that time arrives, the seller intimates that he does not intend to fulfil his contract, the measure of damages will nevertheless be fixed as at the date of delivery if that date is past before the action is raised.¹ A more difficult question arises if the buyer makes his claim before the time fixed for implement of the seller's obligation.² The whole circumstances will then be taken into account in order to arrive at an estimate of the damage. If, for example, in a case of instalment deliveries, the seller repudiates the contract before the deliveries are completed, the buyer may bring his action for damages at once, and in that case, the judge or jury will estimate prospectively the probable difference between the contract and the market price at the respective times when the future deliveries fall to be made.³

Sect. 52.

SPECIFIC PERFORMANCE.

52. In any action^(a) for breach of contract to deliver^(b) specific or ascertained goods^(c) the court may, if it thinks fit, on the application of the plaintiff,^(d) by its judgment or decree^(e) direct that the contract shall be performed specifically,^(f) without giving the defendant^(g) the option of retaining the goods on payment of damages. The judgment or

¹ *Howie v. Anderson* (1848), 10 D. 355; *Brown v. Muller* (1872), L.R. 7 Ex. 319.

² The party not in fault is not bound to wait till the arrival of the proper time for implement, before bringing his action for damage in respect of the contemplated breach. See *Hochster v. De la Tour* (1853), 2 E. & B. 678; *Danube and Black Sea Ry. Co. v. Xenos* (1863), 13 C.B. N.S. 825; *Frost v. Knight* (1872), L.R. 7 Ex. 111; *Johnstone v. Milling* (1886), 16 Q.B.D. 460.

³ Two English cases illustrate this rule and its converse. In *Brown v. Muller* (1872), L.R. 7 Ex. 319, the seller in a contract for delivery by three instalments in three successive months, repudiated the contract before delivery of the first instalment. The buyer in this case waited till the expiry of the three months before bringing his action. The damages found due amounted to the difference in the price of each instalment, calculated at the end of each month. On the other hand, in *Roper v. Johnstone* (1873), L.R. 8 C.P. 167, the buyer sued during the currency of the contract, and the damages were calculated or estimated, according as the several periods of delivery were past or future. See also *Ex parte Llansamlet Tin Plate Co.* (1873), 16 Eq. 155; *Barningham v. Smith* (1874), 31 L.T. N.S. 540. As to instalment deliveries generally, see COM., Sect. 31 *ante*, p. 148.

decree^(a) may be unconditional, or upon such terms Sect. 52. and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff^(d) may be made at any time before judgment or decree.^(h)

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.⁽ⁱ⁾

NOTES.

(a) "*Action*" in Scotland includes condescendence and claim and compensation [Sect. 62 (1)]. See also Sect. 57.

(b) The rules as to delivery are contained in Part III. of the Act, Sects. 27 to 37 inclusive.

(c) "*Specific or ascertained goods.*" "'Specific goods' mean goods identified and agreed upon at the time a contract of sale is made" [Sect. 62 (1)]. "Ascertained goods" are not defined. Probably the phrase refers to goods made specific *after* the contract of sale, *e.g.* goods manufactured or acquired, and afterwards appropriated to the contract, or goods which it is in the power of the seller to make specific by separation from a larger bulk belonging to him.¹ "Ascertained," in the case last mentioned cannot, however, be applied to Sects. 16 or 17. See *ante*, p. 79.

(d) "*Plaintiff*" includes pursuer, etc. [Sect. 62 (1)].

(e) "*Decree.*" The word was introduced in adapting the bill to Scotland.

(f) "*Specifically.*" The words immediately following practically define the term by excluding the alternative.

(g) "*Defendant*" includes, in Scotland, "*defender,*" etc. [Sect. 62 (1)].

(h) *Application for specific performance.* Compare this provi-

¹ "In Scotland, the right to compel delivery is competent to a buyer although the goods purchased are not specific, if it be in the power of the seller to make them so and deliver them. If, for instance, the sale be of part of a whole, the seller may be compelled to separate and deliver without having the option of paying damages for breach of contract and retaining the goods."—T. G. Wright, *Lecture on Sale* (1872), *Jour. of Jurisp.* xvi. 405.

Sect. 52.

sion with Sect. 2 of the English Mercantile Law Amendment Act of 1856,¹ now repealed by Sect. 60 and relative Schedule.

(i) *Specific implement in Scotland.* See COM. *infra*.

COMMENTARY.

Difference
between
English and
Scottish law
of specific
performance.

Scottish prac-
tice allied to
English
principle, and
vice versa.

In England, prior to the Common Law Procedure Act 1854,² as extended by the Mercantile Law Amendment Act 1856,³ specific performance was not allowed except occasionally in the Equity Courts, and, under the Acts now referred to, it was only permitted in the discretion of the judge. In Scotland, on the other hand, it is said that a buyer can always insist upon specific implement unless it is shown to be impossible.⁴ This result is the reverse of what might have been expected from the different principle which, prior to this Act, regulated the passing of the property in England and Scotland respectively. Pothier refers to specific performance as a question much agitated among the civilians, and while his own view was in favour of the existence of the right, he states the contrary arguments of such interpreters of the Roman law as Sculting and Noodt. Among other arguments, "ils disent que le vendeur demeurant propriétaire de la chose vendue jusqu'à la tradition, il seroit incivil de le dépouiller par force de sa propre chose."⁵ This was a good reason for denying the right to specific implement in Scotland, where, as in Roman law, the property did not pass till delivery, but in England, where the buyer was proprietor of goods left in the hands of the seller, it might have been fairly contended that the right to specific performance was a necessary complement of the right of ownership. Thus in Scotland, where principle seemed adverse to specific implement, it has been recognised as a right, while in England, where the same principle

¹ 19 & 20 Vict. c. 97.

² 17 & 18 Vict. c. 125.

³ 19 & 20 Vict. c. 97, Sect. 2, repealed by this Act, Sect. 60 and Schedule.

⁴ See *Stewart v. Kennedy* (1890), 17 Ret. H.L. 1, particularly remarks of Lord Herschell at p. 5, and Lord Watson at p. 10. See also 2nd Report of *Mer. Law Com.* 1855, p. 46; *Bell's Com.* i. 477; *M. P. Brown on Sale*, p. 211.

⁵ *Contr. de Vente*, No. 68.

favoured specific performance, it has only been permitted within recent years and to a limited extent. **Sect. 52.**

But it may be questioned if the right to specific implement in Scotland is much greater than the analogous right in England as now extended by successive legislation, and especially by this section. It ceases on the bankruptcy of the seller, for "the claim then resolves into damage on the maxim *in loco facti imprestabilis subsit damnum et interesse*."¹ The opinion has also been expressed that where specific implement would involve a purchase by the seller from a third party at an exorbitant price, it is in the discretion of the Court to turn the claim into one of damages.²

Divergence may be exaggerated.

53.—(1.) Where there is a breach of warranty^(a) by the seller,^(b) or where the buyer^(b) elects, or is compelled,^(c) to treat any breach of a condition on the part of the seller as a breach of warranty,^(d) the buyer is not by reason only^(e) of such breach of warranty entitled to reject the goods;^(f) but he may **Sect. 53.**

REMEDY FOR BREACH OF WARRANTY.

(a) set up against the seller the breach of warranty in diminution or extinction of the price;^(g) or

(b) maintain an action against the seller for damages for the breach of warranty.^(h)

(2.) The measure of damages⁽ⁱ⁾ for breach of warranty^(a) is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3.) In the case of breach of warranty of quality^(j)

¹ Bell's *Com.* i. 480.

² *Moore v. Paterson* (1881), 9 Ret. 337, per Lord President Inglis at p. 348, and Lord Shand at p. 351. See, as incidentally bearing on this subject, *Allans v. Gilchrist* (1875), 2 Ret. 587; *Cocker v. Crombie* (1893), 20 Ret. 954.

Sect. 53. such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.^(k)

(4.) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.^(l)

(5.) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.^(m)

NOTES.

(a) "*Breach of warranty.*" "As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract" [Sect. 62 (1)]. See also Sect. 11 (2).

(b) "*Seller,*" "*buyer.*" Defined Sect. 62 (1). The claim for damages is only against the seller, not against a sub-contractor under the seller—*Blumer and Co. v. Scott and Sons* (1874).¹

(c) "*Elects or is compelled.*" See COM. *infra*, p. 253.

(d) "*Conditions and warranties.*" See Sects. 10 to 15.

(e) "*By reason only.*" The buyer may be entitled to reject the goods on some other ground, such as fraud.

(f) "*Buyer not entitled to reject the goods.*" The same result follows from the definition of "*warranty*" in Sect. 62 (1) (England and Ireland). See also Sect. 11 (1).

(g) "*Diminution or extinction of price.*" See COM., Sect. 11 *ante*, p. 54. If the price has been already paid the buyer may recover it. In Scotland, the action is for repetition (*condictio indebiti*), while in England, the right to recover is based upon the "consideration" having wholly failed.²

(h) "*Damages for breach of warranty.*" Recovery of the price if paid, will not affect the buyer's claim for damages in respect of the seller's failure to implement the contract. Repayment of

¹ 1 Ret. 379.

² See Notes on the English doctrine of "Consideration," Appendix III. *post*, p. 341.

the price and damages may competently be sued for in the same action. See COM., Sect. 51 *ante*, p. 242. Sect. 53.

(i) "*Measure of damages.*" The ordinary measure of damages is here applied to breach of warranty. In Sects 50 (2) and 51 (2), it is applied to breach of contract by buyer and seller respectively.

(j) "'*Quality of goods*' includes their state or condition" [Sect. 62 (1)].

(k) *Breach of warranty of quality.* Compare this provision with Sects. 50 (3) and 51 (3).

(l) *Action for further damage.* See COM. *infra*, p. 254.

(m) *Right of rejection in Scotland.* See Sect. 11 (2).

COMMENTARY.

In England or Ireland, a buyer may *elect* to treat a condition which would give him the right to repudiate the contract as a mere breach of warranty entitling him only to damages [Sect. 11 (1) (a)], or, where he has accepted goods or the property has otherwise passed to him, he may be *compelled* to treat a condition as a warranty [Sect. 11 (1) (c)].¹ In Scotland, the buyer has necessarily a power of election between the alternative remedies of repudiation and damages provided by Sect. 11 (2), and the mere passing of the property will not, as in England, *compel* a buyer to accept damages where he would otherwise be entitled to reject and repudiate. On the other hand, if a buyer in Scotland does not *timeously* reject goods which are not in terms of the contract, his remedy of repudiation is gone. Under the former law of Scotland the buyer had no remedy except rejection and repudiation, but now he may elect between that right and the English remedy of damages. If by neglect to reject the goods, or in any other way, the buyer has lost the right to repudiate, he may still fall back upon his new remedy. There is no provision for notice to the seller of the buyer's intention to claim damages, but

Damages in relation to conditions and warranties. Law of England and Scotland compared.

Effect of Act upon law of Scotland.

Notice of claim not statutory requisite.

¹ In *Heyworth v. Hutchinson* (1867) L.R. 2 Q.B. 447, there are *dicta* to the effect that if the goods are *specific*, even although the property has not passed, the buyer is restricted to an action on the warranty and is not entitled to reject. But see criticism by Benjamin (*Sale*, p. 936 *et seq.*).

Sect. 53.

unreasonable delay in intimating a claim will form a strong presumption against its validity.¹

Rejection where justified infers non-delivery.

Where in Scotland, the buyer's right to reject under Sect. 11 (2) is properly exercised, the seller is in no better position than if he had failed by non-delivery, and the buyer's remedy in damages proceeds under Sect. 51. Under the present section there is no repudiation of the contract. The buyer keeps the goods, but as in Sects. 51 and 53, the true value is to be ascertained as at the time of delivery and put against the contract value.²

This section does not apply to rejection.

Diminution or extinction of price—further loss.

Under sub-section (4) a deduction from the price, or even its total extinction, will not prevent a claim by the buyer for further loss if such has been sustained. Thus, for example, the failure of a seed crop may extinguish the obligation to pay the price, yet it does not necessarily form the limit of the buyer's damage, for his field may have been rendered useless for other crops, and he may have been at expense in tilling and sowing. Or, again, the subject of sale, when applied to the buyer's goods, may through its bad quality, have caused permanent injury to the goods themselves as in *Birnie and Co. v. Weir*³ (1800), and *Pontifex and Wood v. Robertson*⁴ (1876). The sub-section is chiefly founded on *Mondel v. Steel*⁵ (1841), where under a contract for a ship to be built, the buyer obtained an abatement in an action at the seller's instance for the price, and after a voyage, which disclosed further defects, he successfully maintained an action against the seller for special damage. But the case largely depended on English rules of pleading as these existed before the Judicature Acts of 1873⁶ and 1875.⁷ "The rule is," said Parke, B., "that it is competent for the defendant not to set off by a procedure in the nature of a cross action the amount of damages

Mondel v. Steel.

Rule as stated by Parke, B.

¹ See Com., Sect. 11 *ante*, p. 54.

² The price may form the measure of the damages as in *Wright v. Blackwood* (1833), 11 Sh. 722. See also *Adamson v. Smith* (1799), Mor. 14244, where the buyer in pursuing an action of damages restricted the amount to the price and interest, and in respect of the restriction, the damages were so fixed.

³ H. L. 4 Pat. App. 144.

⁴ Shf. Ct. Glasgow, Guthrie's Sel. Cases, 2nd ser. 508.

⁵ 8 M. & W. 858.

⁶ 36 & 37 Vict. c. 66.

⁷ 38 & 39 Vict. c. 77.

which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth by reason of the breach of contract; and *to the extent* that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action *to that extent but no more.*"¹ The more extensive powers of set-off now granted to a defendant under the Judicature Acts and relative Orders,² do not seem to have affected the buyer's right to split up his claim into two portions, but how far this will apply to Scotland where a different rule of pleading prevails, may be open to question.³

Rules of pleading in England and Scotland.

In *Webster and Co. v. Cramond Iron Co.*⁴ (1875), iron pipes were not delivered timeously, but they were ultimately accepted, and the buyers failed to prove that they could have profitably used them before the date of their actual delivery, or that they had suffered any specific pecuniary damage. It was, nevertheless, held that they were entitled to moderate damages in respect of the trouble and inconvenience sustained.

In Scotland, damages may be allowed for trouble and inconvenience.

54. Nothing in this Act shall affect the right of the buyer or the seller to recover interest^(a) or special damages^(b) in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.^(c)

Sect. 54.

INTEREST AND SPECIAL DAMAGES.

¹ 8 M. & W. at p. 872. See also *Rigge v. Burbridge* (1846), 15 M. & W. 598.

² Under these Acts and Orders a defendant may now set up by way of counterclaim any claim, whether sounding in damages or not, which he has against the claim of the plaintiff (Order XIX., Rule 3), and he is enabled to recover consequential damages which may far exceed the amount of the price sued for by the plaintiff (Order XXI., Rule 17).

³ See as to "*Competent and omitted*," Stair, iv. 1. 44-50; Ersk. iv. 3. 3; Bank, iv. 36. 16; Bell's *Com.* ii. 259; Mackay's *Prac.* (ed. 1893), p. 312.

⁴ 2 Ret. 752.

Sect. 54.

NOTES.

(a) As to interest on the price in Scotland see COM., Sect. 49 *ante*, p. 236.

(b) "*Special damages*." This phrase covers a distinction in English law which has not been expressly recognised in Scotland, though the result would probably be the same in both countries. It embodies the second part of the rule in *Hadley v. Baxendale*¹ (1854), where it was said that the damage may be "such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."²

(c) *Failure of consideration*. The doctrine of "Consideration" does not apply to Scotland. See Notes, Appendix III. *post*, p. 341.

¹ 9 Ex. 341 at p. 354. The first part of the rule refers to general damages, and is quoted, COM., Sect. 50, *ante*, p. 239.

² See the following English cases as to special damages—*Fletcher v. Tayleur* (1855), 17 C.B. 21; *Portman v. Middleton* (1858), 4 C.B. N.S. 322; *Sneed v. Ford* (1859), 1 E. & E. 602; *Cory v. Thames Ironworks Co.* (1868), L.R. 3 Q.B. 181; *Sawdon v. Andrews* (1874), 30 L.T. N.S. 23; *Hydraulic Engineering Co. v. M'Haffie* (1878), 4 Q.B.D. 670; *Grebert Borgnis v. Nugent* (1885), 15 Q.B.D. 85; *De Mattos v. Great-Eastern Steamship Co.* (1885), 1 C. & E. 489; *Hammond v. Bussey* (1887), 20 Q.B.D. 79.

PART VI.

SUPPLEMENTARY.

55. Where any right, duty, or liability would arise under a contract of sale by implication of law,^(a) it may be negatived or varied by express agreement^(b) or by the course of dealing between the parties,^(c) or by usage,^(d) if the usage be such as to bind both parties to the contract.

Sect. 55.

**EXCLUSION OF
IMPLIED TERMS
AND CONDI-
TIONS.**

NOTES.

(a) "*Implication of law.*" *E.g.* implied conditions and warranties (Sects. 12-15); the effect of the rules for ascertaining intention as to passing the property (Sect. 18); the rights of the unpaid seller (Sect. 39). "An implied warranty, as distinguished from an express contract or express warranty, really is in all cases founded upon the presumed intention of the parties, and upon reason."¹

(b) "*Express agreement.*" "Express or special conditions are employed to introduce some point of agreement not naturally implied in the contract, or to alter what is so implied. They may either regulate the payment of the price, or arrange the delivery, or suspend or dissolve the sale in particular events, or give special warranties."²

¹ Per Bowen, L. J., in *The Moorcock* (1889), 14 P.D. 64 at p. 68, quoted and approved by Lord Esher in *Hamlyn and Co. v. Wood and Co.* (1891), 60 L.J. Q.B. 734 at p. 736.

² Bell's *Prin.*, Sect. 102. "Le droit commun des contrats de vente, qui oblige le vendeur envers l'acheteur à la garantie de la chose vendue, ne con-

Sect. 55.

- (c) "Course of dealing between the parties." See COM. *infra*.
 (d) "Usage." See COM. *infra*, p. 259.

COMMENTARY.

Express agreement supersedes implied intention.

The rule of the section follows the maxim *Expressum facit cessare tacitum*. In a consensual contract such as sale, all implications of law must give way to the agreement of parties, where such agreement is not illegal. "If there is one thing more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice."¹

Requisites of express warranty.

To render a seller liable in *express warranty*, it is not necessary to use the words "I warrant." "It is quite enough," for example, "that the purchaser says he wishes a horse for a particular purpose, and that the seller says the horse will suit for that purpose. That is quite as good as express words of warrandice."²

Course of dealing.

A course of dealing between the parties forms a case of particular as opposed to general usage, but it must be between the parties themselves.³ A mere practice on the part of one of the parties to deal generally in the market in a certain manner, will not negative or vary an implication of law. Thus in *Mackenzie v. Dunlop*

Mackenzie v. Dunlop.

cernant qu'un intérêt particulier des acheteurs, il est permis aux parties de déroger à ce droit par des conventions particulières"—Pothier, *Cont. de Vente*, No. 181.

¹ Per Jessel, M.R., in *The Printing and Numerical Co. v. Sampson* (1875), 19 Eq. 462 at p. 465, adopted by Fry, J., in *Rousillon v. Rousillon* (1880), 14 Ch. Div. 351 at p. 365.

² Per Lord Cowan in *Scott v. Steel* (1857), 20 D. 253 at p. 257. But see opinion of Lord Justice-Clerk Moncreiff in *Rose v. Johnston* (1878), 5 Ret. 600 at p. 603. *Scott v. Steel* was followed in *Strange v. Jardine* (1894), Sh. Ct. Glasgow, 11 Sh. Ct. Repts. 49. A written representation without the use of the word "warrant," was held to be an express warranty in *Stewart v. Jamieson* (1863), 1 Macp. 525. See further, in general illustration, *Pasley v. Freeman* (1789), 3 T.R. 51; *Gardiner v. McLeavy* (1880), 7 Ret. 612, and COM., Sect. 14 *ante*, p. 71.

³ See *Ford v. Yates* (1841), 2 M. & G. 549; *Bourne v. Galliff* (1844), 11 Cl. & Fin. 45; *Cumming v. Shand* (1860), 5 H. & N. 95.

and Co.¹ (1856), which was an action between the granters of iron scrip and an assignee of the original grantee, evidence was allowed before a jury that the granters had been in the habit of admitting an interpretation of the documents which did not appear *ex facie*. On a bill of exceptions, the Court of Session disallowed the evidence as incompetent,² but, while affirming the judgment on the issue as put to the jury, the House of Lords suggested that the evidence would have been competent so far as it went to prove *general* usage, although it was of no value in so far as it only showed the practice of a particular firm in miscellaneous transactions not constituting a course of dealing between the granters and the holders of the scrip. Lord Chancellor Cranworth said the evidence was "properly admitted, because, though very weak evidence, it was some evidence to show the general usage. General usage can only be proved by the multiplication of particular usages."³ "If according to the true construction of the notes the iron can, according to the usage of the trade, be said *ex facie* to mean Clyde and Dundyvan iron, well; if not, no parol evidence can be admitted to put a construction upon the notes by proving that the persons who had purchased the notes had agreed to receive from the person who sold the notes a particular species of iron."⁴ "If the evidence had been coupled with that of other persons saying that that was what everybody else understood as the usage of the trade, that would have been very sufficient evidence."⁵

Sect. 55.

General usage.

In mercantile matters, where the proof in Scotland is insufficient, it may be supplemented by proof of well-established English practice. "In a question of the merchant law, when any point of practice or any rule of

Effect in
Scotland of
English usage.

¹ 16 D. 129, Affd. H. of L. 3 Macq. 22.

² Lord Justice-Clerk Hope said: "We have never in Scotland gone so far as they have done in England in admitting evidence of understanding or usage in order to construe thereby a written document"—16 D. at p. 139.

³ 3 Macq. at p. 27.

⁴ 3 Macq. at p. 36.

⁵ 3 Macq. at p. 40. See also *Calder v. Aitchison and Co.* (1831), 9 Sh. 777, Affd. H.L. 5 W. & S. 410; *Gibson v. Maguire* (1876), Sh. Ct. Glasgow, Guth. Sel. Ca. 2nd ser. 517.

Sect. 55.

trade is established as the law of England, especially in modern times, and when the reason of the rule is the same in both parts of the island, there is the very strongest presumption that the practice or rule will prevail in Scotland also, unless the contrary be clearly established.”¹

Requisites of proof of usage.

A proof of what generally happens is not, however, by itself, a proof of usage.² Where evidence of usage is competent, it must be usage such as is generally understood and acted on. “The proof must be satisfactory, and the usage proved must be sufficient, for proof of a divided usage will not sustain a judgment.”³

Nature of usage required.

The usage must be “such as to bind both parties to the contract,” that is, it must either be actually within the knowledge of both parties, or such that the law will presume knowledge on the part of both.⁴

Usage in relation to ready-money sales.

Proof of usage may be of importance in questions regarding ready-money sales. Thus, where a buyer was sued for the price of sheep and cattle bought at a public market and taken away by him, he was allowed proof of usage in order to establish a presumption in support of his averment of payment on delivery.⁵

When may usage be judicially recognised ?

A distinction is to be taken between usage which requires to be proved as a matter of fact, and usage which has been judicially recognised and may be acted upon by the Courts without proof. “Where a trade,” says Lord

¹ Per Lord Gifford in *Strong v. Philips and Co.* (1878), 5 Ret. 770. See also *Sheriff v. Stein's Assignees* (1828), 4 Mur. 454; *Stein's Assignees v. Sheriff* (1828), 7 Sh. 47.

² Per Lord Gifford in *Brown v. McConnell* (1876), 3 Ret. 788.

³ Per Lord Ardmillan in *Armstrong and Co. v. McGregor and Co.* (1875), 2 Ret. 339 at p. 343.

⁴ See elaborate judgment in *Robinson v. Mollet* (1875), L.R. 7 H.L. 802. Also *Kirchner v. Venus* (1859), 12 Moo. P.C. 361. “The result of the authorities, both Scotch and English, is that where a custom is purely local, it cannot be taken to control or explain the words of a written instrument, unless it was known to both parties.”—Per Lord President Inglis in *Holman v. Peruvian Nitrate Co.* (1878), 5 Ret. 657 at p. 671. As to the general effect of usage see further, *Lombe v. Scott* (1779), Mor. 5627; *M'Eachern v. Ewing and Co.* (1824), 2 Sh. 724; *Wear and Colley v. Davidsons* (1873), Sh. Ct. Aberdeen, Guthrie's Sel. Cas. 1st ser. 513; *Marston v. Kerr's Trustee* (1879), 6 Ret. 898.

⁵ *Stewart v. Gordon* (1831), 9 Sh. 466. See also *Arnot v. Watt* (1825), 4 Sh. 4. But the plea was not allowed where the buyer first denied delivery, and (after delivery was proved) pleaded the usage of public market—*Kidd v. Brown* (1828), 6 Sh. 825.

Blackburn, "has been long established, its customs become known to the law, and are judicially taken notice of as a matter of law."¹ **Sect. 55.**

56. Where, by this Act, any reference is made to a reasonable time^(a) the question what is a reasonable time is a question of fact. **Sect. 56.**
REASONABLE TIME A QUESTION OF FACT.

NOTE.

(a) "*Reasonable time.*" The words are used in Sects. 11 (2), 18, Rule 4 (b), 29 (2), 35, 37, and 48 (3).

COMMENTARY.

In England, the ascertainment of questions of fact by means of a jury is much more general than in Scotland,² and the provision of this section is intended to set at rest, so far as regards this Act, certain questions which have arisen in English law. Taylor, in his work on *Evidence*, says: "The line between law and fact has been very indistinctly drawn in a certain class of cases, and in these cases, therefore, the respective duties of the judge and jury are not yet clearly defined. For instance, if the question be whether a certain party had

Ascertainment of fact by jury.
Relation of law to fact in England.

¹ Blackburn on *Sale*, p. 80. See *Brandao v. Barnett* (1846), 12 Cl. & Fin. 787. As to proof generally, see *Athya and Co. v. Rowell and Co.* (1856), 18 D. 1299 (period of credit), *Towill and Co. v. The British Agricultural Association* (1875), 3 Ret. 117 ("cash in 14 days as usual"), also Dickson on *Evidence* (2nd ed.) Sects. 196, 197, (Grierson's ed.) Sects. 1060, 1061.

² In Scotland, prior to the institution of the Court of Session in 1532, facts in civil as well as in criminal cases were often proved before an assize or jury, but between 1532 and 1815, jury trial was almost entirely confined to crimes. In the latter year a special Jury Court for the ascertainment of facts in civil cases was created by statute (55 George III. c. 42) and continued till 1830, when it was merged in the Court of Session (1 William IV. c. 69). The cases to be tried by jury were at first left entirely to the discretion of the Court (55 George III. c. 42, Sects. 1, 2), and although by subsequent statutes (e.g. 59 George III. c. 85), certain causes were enumerated as appropriate to jury trial, the system of trial by jury in civil cases never took firm hold. In 1866, the growing disinclination to jury trial led to power being given to the Lord Ordinary to take proof of facts before himself "if both parties consent thereto, or if special cause be shown" (29 & 30 Vict. c. 112). "Since 1868, however, a more economical and expeditious mode of conducting jury trials has led to a certain reaction in their favour." See Mackay's *Manual of Practice*, p. 326, and remarks of Lord Justice-Clerk Hope in *M'Clelland v. Rodger and Co.* (1842), 4 D. 646 at p. 651.

Sect. 56.

probable cause for doing an act, or whether he has done an act within a reasonable time, or with due diligence, it is difficult to say whether the definition of what constitutes probable cause, reasonable time, or due diligence, be for the judge or the jury, and specious arguments will not be wanting in favour of the claims of either party. On the one hand, it may be said that these terms are as capable of judicial interpretation as the words conversion, or asportation, which must, clearly, be explained by the judge; while, on the other hand, it may be urged that they seem rather addressed to the practical experience of practical men, than to the legal knowledge of the mere lawyer; that, being terms of degree, their meaning is subject to indefinite fluctuation according to the varying circumstances of each particular case, and that, consequently, they defy all attempts to compress them within exact *a priori* definitions. In truth, they are neither matters of fact nor matters of law exclusively, but are rather matters of quality or opinion, which, for want of a more appropriate name, have been generally termed 'mixed cases.'¹ The effect of the section is that questions arising under the Act as to what is a reasonable time should be submitted to a jury, where the general facts of the case are proved in this way.

Effect of
section.

Sect. 57.

RIGHTS ETC.
ENFORCEABLE
BY ACTION.

57. Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.^(a)

NOTE.

(a) "'Action' includes in Scotland, condescendence and claim and compensation" [Sect. 62 (1)].

COMMENTARY.

In Scotland, it is scarcely necessary to declare that rights connected with sale are enforceable by action. In

¹ Taylor on *Evidence*, 6th ed., vol. i. pp. 38, 39.

this respect the law differs to some extent from that of England, where by a rule of the common law, when a statute provides no express penalty for contravention, such contravention is punishable as a misdemeanour.¹ In Scotland, no such rule obtains. On the contrary, where in the course of criminal proceedings it appears that the case raises a mere question of civil right, it should either be dismissed, or sisted to allow of the fact being clearly ascertained.² A civil remedy should be available for the redress of every civil wrong,³ and accordingly, in Scotland, "there is hardly any combination of circumstances, and no involution of conflicting claims either of right or of *status*, which may not be explicated in the Court of Session by means of an action founded on the special circumstances of the particular case, and concluding for the proper legal remedy or redress."⁴

Sect. 57.
In England right of civil action not always recognised—otherwise in Scotland.

58. In the case of a sale by auction—

Sect. 58.
AUCTION SALES.

(1.) Where goods are put up for sale by auction in lots, each lot is *primâ facie* deemed to be the subject of a separate contract of sale :^(a)

(2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer,^(b) or in other customary manner. Until such announcement is made any bidder may retract his bid :

(3.) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to

¹ Stephen's *Digest of Criminal Law*, 3rd ed., p. 87.

² Macdonald on *Criminal Law*, 3rd ed., p. 526.

³ "It would import us little that rights belonged to us, or that persons stood obliged to us, if there were no method by which we might make those rights effectual and attain the enjoyment of our property, or compel those who stand bound to us to perform their obligations."—Ersk. iv. 1. 1.

⁴ Bell's *Law Dict.*, *voce* "Action."

Sect. 58.

employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person : Any sale contravening this rule may be treated as fraudulent by the buyer :^(c)

(4.) A sale by auction may be notified to be subject to a reserved or upset price,^(d) and a right to bid^(e) may also be reserved expressly by or on behalf of the seller.^(f)

Where a right to bid^(e) is expressly reserved, but not otherwise, the seller, or any one person^(f) on his behalf, may bid at the auction.

NOTES.

(a) "*Contract of sale.*" Defined Sects. 1 and 62 (1). As to each lot being the subject of a separate contract, see *Couston, Thomson, and Co. v. Chapman*¹ (1872); *Emmerson v. Heelis*² (1809).

(b) "*Fall of the hammer.*" See COM. *infra*.

(c) "*Not lawful for seller to bid.*" See COM. *infra*, p. 265.

(d) "*Upset price.*" The words "*or upset*" were inserted in the bill on a suggestion from Scotland.

(e) "*Right to bid.*" This has nothing to do with "reserved price." If the right to bid is reserved, the seller or his representative may bid as often as he pleases.

(f) "*Any one person.*" See COM. *infra*, p. 265.

COMMENTARY.

Law of Scotland modified.

The law, or at least the practice, of Scotland is altered by this section in two particulars—

Retracting bid.

1. It is provided [Sub-sect. (2)] that until the fall of the hammer, any bidder may retract his bid. This is consistent with the English principle that an offer may be withdrawn at any time before acceptance, even where the offerer specially agrees to keep it open for a specified time, it being held that there is no "consideration" for the

¹ 10 Macp. H.L. 74.

² 2 Taunt 38.

engagement to continue the offer till the expiry of the time mentioned.¹ In Scotland, effect is not given to the doctrine of "Consideration,"² and therefore the offer is held to subsist in terms of the arrangement, provided the offerer "continues alive and capable of consent at the time of acceptance."³ In regard to auction sales, the rule in Scotland has been in conformity with an interpretation of the Roman law which is thus expressed by Moyle: "If the intention is that the highest bidder is to have the goods without reference to the relation between the amount of his bid and their real value, then the vendor is the proposer, and the contract is concluded by the making of the last bid, each bid being an acceptance conditional on no higher bid being made. . . . The best authorities on the Civil Law . . . seem to be in favour of the view that, in the absence of evidence of a contrary intention, each bid or offer is to be deemed to be withdrawn or to lapse *as soon as a higher bid is made*, so that the vendor can accept no bid except the highest. . . . It also seems to be very generally held that, even where a bid is a mere offer and not a conditional acceptance, *it cannot be retracted*, and this is explained by assuming a tacit '*pactum de emendo*,' or an implied undertaking that it shall not be withdrawn."⁴

2. The right of a seller to bid by himself or by any one person on his behalf, provided such right is expressly reserved, is a novelty in the law of Scotland.⁵ The distinction, however, need not be put on higher ground than that of practice, for if sufficient intimation be made of the intention of the seller to bid by himself or by another,

Right of seller
to bid.

¹ *Cooks v. Oxley* (1790), 3 T.R. 653; *Dickinson v. Dodds* (1876), 2 Ch. D. 463.

² *Lavo v. Humphrey* (1874), 3 Ret. 1192.

³ Bell's *Com. i.* 344; Bell on *Sale*, pp. 33, 38. See as to the English doctrine of "Consideration," Appendix III. *post*, p. 341.

⁴ Moyle's *Sale in the Civil Law*, pp. 167-169. The English rule was affirmed in *Payne v. Cave* (1789), 3 T.R. 148 and *Warlow v. Harrison* (1858), 1 E. & E. 295.

⁵ It was held in a Sheriff Court case, that the seller may bid if he merely holds the goods in security and has not the radical right—*Hendry v. Newton, Bennie, and Co.* (1874), Sh. Ct. Airdrie, Guthrie's *Sel. Cas.* 1st ser. 529. It is submitted, however, that there is no good reason for this distinction. The rule undoubtedly applies to trustees and other fiduciaries, and, *a fortiori*, it should apply to a seller having a direct personal interest.

Sect. 58.

Opposed to
Scottish usage.

there is no reason why the Court should reduce the sale as fraudulent. But such intimation is so opposed to Scottish usage that few bidders would be likely to offer, and in the form here suggested, it is quite unknown in Scotland. The object aimed at is usually attained by fixing an upset price. It is not likely that even the express statutory sanction given by this section to a bid by the seller or by one person on his behalf, will render such procedure general in Scotland. There is no provision in the Act for the identification of the seller or of the person empowered to bid on his behalf, and strangers are not likely to offer without knowing distinctly by whom the reserved power is to be exercised. If the competition lies between a *bona-fide* offerer, and a person who is *known* to be empowered to exercise the reserved bid, the purpose would seem to be at least as well served by the Scottish practice of an upset price. In any event, the Court will, no doubt, take care that the reserved bid is not sanctioned without ample proof that the intention to exercise it is clearly made known to all intending offerers. The rules of the law of Scotland as to the illegality of any unfair means to enhance the price are well established, and are at least quite as strict as the English rules, even in their recent sterner developments.¹

Sect. 59.

59. In Scotland where a buyer^(a) has elected to accept^(b) goods which he might have rejected,^(c) and to

¹ In England, a different rule seems to have prevailed in equity and at common law. Formerly, in equity, the seller might employ one person to bid without expressly intimating his intention to do so. So far as sales of land were concerned, this was altered by the Sale of Land by Auction Act 1867 (30 & 31 Vict. c. 48), which made puffers illegal, alike in Courts of law and of equity, except under conditions akin to those of the present section. It is practically the rule of the Act referred to, which is now extended to the sale of goods. As to the law of Scotland, see M. P. Brown on *Sale*, p. 578 *et seq.*; More's *Stair*, p. 91, notes; Ivory's *Erskine*, p. 639, note; Bell's *Prin.*, Sects. 130-132, and the following cases—*Grey v. Stewart* (1753), Mor. 9560; *Murray v. Macwhan* (1783), Mor. 956; *Cres v. Durie* (1st December 1810), F.C.; *Anderson v. Stewart* (16th December 1814), F.C.; *Faulds v. Corbet* (1859), 21 D. 587; *Shiell v. Guthrie's Trustees* (1874), 1 Ret. 1088; *Strachan v. Auld* (1884), 11 Ret. 756. As to intimation of the conditions of sale and its effect upon the bidders, see *Hain v. Laing* (1853), 15 D. 667; *Christie v. Hunter* (1880), 7 Ret. 729; *Macdonald and Fraser v. Henderson* (1882), 10 Ret. 95; *White and Co. Ltd. v. Dougherty* (1891), 18 Ret. 972.

treat a breach of contract as only giving rise to a claim for damages,^(a) he may, in an action^(e) by the seller^(a) for the price,^(f) be required, in the discretion of the court^(g) before which the action depends, to consign or pay into court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.^(h)

Sect. 59.
PAYMENT INTO
COURT IN
SCOTLAND
WHEN BREACH
OF WARRANTY
IS ALLEGED.

NOTES.

- (a) "*Buyer*"—"seller." Defined Sect. 62 (1).
- (b) "*Elected to accept.*" Formerly the buyer in Scotland had no right of election. His claim for damages in respect of the seller's breach depended on his having timeously rejected the goods and repudiated the contract. Now, he has the alternative remedies of rejection or damages. See COM., Sect. 11 *ante*, p. 52.
- (c) "*Might have rejected.*" The buyer's right of rejection is expressly reserved by Sect. 11 (2), but the rejection must be timeous. See also Sect. 53 (5).
- (d) "*Claim for damages.*" The buyer has now the option of retaining the goods and treating the seller's failure "as a breach which may give rise to a claim for compensation or damages" [Sect. 11 (2)].
- (e) "*'Action'* includes in Scotland condescendence and claim and compensation" [Sect. 62 (1)]. Formerly the price might be sued for in Scotland whether the property had passed or not. See COM., Sect. 49 *ante*, p. 235, and compare Sects. 49, 50, 57, and 61 (2).
- (f) "*Price.*" See Sects. 8 and 9 *ante*, pp. 35, 41.
- (g) "*Court.*" No definition is given or required. The common law jurisdiction in actions of sale is maintained. See Sect. 61 (2).
- (h) "*Discretion of Court, in Scotland, to order consignation.*" See COM. *infra*.

COMMENTARY.

The provision of this section is intended to guard against the abuse of the alternative remedy given to the buyer by Sect. 11 (2). It may be said that according to the law of Scotland (differing from that of England) it was always within the discretion of the Court to order consignation.

Power of
Court in
Scotland before
the Act.

Sect. 59.

"The English Courts will not order money to be brought into Court upon anything short of a distinct admission of the party that the money is owing from him,¹ and the reason of the rule is very obvious, for, were it otherwise, the Court might have to hear the whole cause twice over, upon the motion for bringing in the money, and, again, upon the final hearing. . . . No such rule is propounded in Scotland. If the Court is satisfied, *quovis modo*, that a sum will ultimately be payable, it makes the order which it judges will best secure the fund for the party to whom it is payable."² The common-law right of the Scottish Courts to call for consignation was, however, by no means clear, and it was sometimes practically negatived. Thus in *Findlay v. Donaldson*³ (1846) the Court of Session ordered consignation, but the House of Lords reversed, holding that "there was not a sufficient *medium concludendi* whereupon they might have proceeded in the exercise of their discretion."⁴ In this case, Lord Campbell said: "It is a rule, and a very salutary rule in the Courts of England, that they will not order money to be paid into Court unless there be a clear admission of the money being in the hands of the party. . . . But, though such is the law and practice of England, we do not by any means say that that law and that practice shall be adopted in Scotland, though we have great reason to regret that no rule of the kind does prevail there, and that it is a mere matter of discretion in each particular case."⁵ The Courts in Scotland have hitherto, rarely, if ever, called for consignation in ordinary actions for the price of goods supplied. The express power here given is therefore a suggestion for guidance, as well as a warrant for procedure.

Sect. 60.

REPEAL.

60. The enactments mentioned in the schedule to this Act are hereby repealed as from the commence-

¹ *Richardson v. Bank of England* (1838), 4 Myl. & Cr. 165.

² Per Lord Brougham (*obiter*) in *Findlay v. Donaldson* (1846), 5 Bell's App. 105 at p. 118.

³ 5 Bell's App. 105.

⁴ Per Lord Brougham, 5 Bell's App. at p. 121.

⁵ 5 Bell's App. at p. 124.

ment of this Act^(a) to the extent in that schedule Sect. 60. mentioned.^(b)

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.^(c)

NOTES.

(a) *Commencement of Act.* The Act came into operation on 1st January 1894 (Sect. 63), although it did not receive the royal assent till 20th February 1894. It is therefore retrospective in its operation. See NOTE, Sect. 63 *post*, p. 289.

(b) The schedule repeals Sects. 15 and 16 (commonly cited as Sects. 16 and 17) of the English Statute of Frauds, but does not repeal the corresponding section of the Irish Statute of Frauds.¹ Nothing in the Act is to affect any enactment relating to the sale of goods which is not *expressly* repealed [Sect. 61 (3)]. The omission to repeal the Irish Statute seems an oversight.

(c) Compare this proviso with Sect. 38 of the Interpretation Act 1889.²

61.—(1.) The rules in bankruptcy^(a) relating to Sect. 61. contracts of sale shall continue to apply thereto, not- SAVINGS. withstanding anything in this Act contained.

(2.) The rules of the common law,^(b) including the law merchant,^(c) save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent^(d) and the effect of fraud, misrepresentation,^(e) duress or coercion,^(f) mistake, or other invali-

¹ 7 William III. c. 12, Sect. 13 (Irish Statutes).

² 52 & 53 Vict. c. 63.

Sect. 61. dating cause,^(a) shall continue to apply to contracts for the sale of goods.

(3.) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale,^(b) or any enactment relating to the sale of goods which is not expressly repealed by this Act.^(c)

(4.) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.^(d)

(5.) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.^(e)

NOTES.

(a) "*Rules in bankruptcy.*" Among the rules in bankruptcy saved by this sub-section, is the statutory reputed ownership provided by Sect. 44 of the English Bankruptcy Act of 1883.¹ See COM., Sect. 17 *ante*, p. 83. In Scotland, reductions at common law or under the Acts 1621,² 1696,³ or 1856⁴ are preserved. This and the two following sub-sections are framed on the model, and for the most part in the language, of Sect. 97 of the Bills of Exchange Act 1882.⁵

(b) "*Rules of the common law.*" Where the common law of England and Scotland differs, occasional complications may be expected, as in *Talisker Distillery v. Hamlyn and Co.*⁶ (1893), Affd. H. of L.⁷ (1894).

(c) "*Law merchant.*" "There is no part of the history of English law more obscure than that connected with the common maxim that the law merchant is part of the law of the land."⁸

¹ 46 & 47 Vict. c. 52.

² 1621, c. 18.

³ 1696, c. 5.

⁴ 19 & 20 Vict. c. 79. As examples of reductions affecting the sale of goods, see *Wright v. Mitchell* (1871), 9 Macp. 516; *Gourlay v. Hodge* (1875), 2 Ret. 738, and other cases in Appendix II. III. (6) and III. (7).

⁵ 45 & 46 Vict. c. 61.

⁶ 21 Ret. 204.

⁷ 21 Ret. H.L. 21. In consequence of this judgment an Act was immediately afterwards passed to amend the Scottish Law of Arbitration (57 & 58 Vict. c. 18).

⁸ Blackburn, p. 317. See sketch of the history of the law merchant in England, Blackburn, pp. 317 *et seq.*, also Bell's *Com.*, Preface, p. xi. A more

(d) *Principal and agent.*" See generally on this subject in its relation to the sale of goods, Bell's *Com.*, 7th ed. i. 458-460 and editor's notes; also *Brydon v. Muir*¹ (1869); *Athya v. Buchanan and Son*² (1872); *Stewart, Brown, and Co. v. Biggart and Fulton*³ (1893).

(e) *Fraud, misrepresentation, mistake.* See *COM. infra*.

(f) *Duress or coercion.* In Scotland called "force," with which "fear" is usually conjoined. See authorities noted below.⁴

(g) *"Other invalidating cause."* Such as illegality or impossibility. See Sect. 11 (3).

(h) *"Bills of sale."* See *COM.*, Sect. 17 *ante*, p. 84.

(i) *Enactments not repealed.* *E.g.* Sect. 13 of the Irish Statute of Frauds.⁵ See note (b), Sect. 60 *ante*, p. 269. Many Acts make special provision as to the sale of goods of a particular class or description, *e.g.* chain cables and anchors,⁶ food and drugs,⁷ explosives,⁸ poisons,⁹ goods under a trade mark,¹⁰ goods sold by weight or measure,¹¹ and fertilisers and feeding stuffs.¹²

(j) *Mortgage, pledge, etc.* See *COM. infra*, p. 276.

(k) *Landlord's hypothec in Scotland.* This sub-section re-enacts Sect. 4 (now repealed) of the Scottish Mercantile Law Amendment Act 1856.¹³ The original provision formed a qualification of the purchaser's right, under Sect. 1 (also now repealed) of the Mercantile Law Amendment Act, to demand delivery as against the seller's creditors. An ordinary creditor of the seller could not, under the Act, prevent delivery to the buyer upon payment of the price, but the right of a landlord in virtue of his hypothec was superior to that of the buyer. Similarly, under this Act, though the property in goods sold has passed to the buyer, his right must yield to that of the seller's landlord where hypothec exists.

COMMENTARY.

Fraud.—Bell, following the civilians and Pothier, distinguishes between fraud *quod causam dedit contractui*, and

Effect of fraud upon the contract of sale.

extended history by Master Macdonell will be found in his introduction to the 10th ed. of Smith's *Mercantile Law*, p. lxi. *et seq.*, and another by Mr. Thos. E. Scrutton in his *Elements of Mercantile Law*, pp. 1-39.

¹ 7 Macp. 536.

² 45 Sc. Jur. 16.

³ 21 Ret. 293.

⁴ Stair, i. 9. 8; Ersk. iii. 1. 16, iv. 1. 26; Bell's *Com.* i. 314-315; Bell's *Prin.*, Sect. 12; M. P. Brown, p. 395 *et seq.* See also Pollock on *Contract*, 6th ed. p. 576 *et seq.*

⁵ 7 William III. c. 12 (Irish Statutes).

⁶ 34 & 35 Vict. c. 101, Sect. 7; 37 & 38 Vict. c. 51.

⁷ 38 & 39 Vict. c. 63; 42 & 43 Vict. c. 30.

⁸ 38 Vict. c. 17.

⁹ 31 & 32 Vict. c. 121, Sect. 17; 32 & 33 Vict. c. 117, Sect. 3.

¹⁰ 50 & 51 Vict. c. 28.

¹¹ 41 & 42 Vict. c. 49.

¹² 56 & 57 Vict. c. 55.

¹³ 19 & 20 Vict. c. 60.

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fraud *quod tantum in contractum incidit*. "Fraud," he says, "of the former kind annuls the contract; fraud of the latter species gives only an action for restitution or damages."¹ But the contract, even though induced by fraud, is not *ipso jure* void. It is only voidable *ab initio* at the instance of the person defrauded.² *Dolus dans causam contractui* is what English writers call *material* fraud, and it is only material fraud which gives a remedy.³ Where the fraud is material, the defrauded person may avoid the contract provided he can give *restitutio in integrum*, or he may, in his option, claim damages, even though matters are not entire.⁴

The idea of "legal fraud" or "fraud at law," as something intermediate between *bona fides* and *mala fides* has been clearly negatived. "I do not understand legal fraud," said Lord Bramwell, L. J. "To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud or of anything else, except where some duty is shewn and correlative right, and some violation of that duty and right."⁵ "Fraud," said Lord Herschell, "is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. . . . The third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false state-

¹ Bell's *Com.* i. 262; Bell's *Prin.*, Sect. 13. See also Pothier, *Oblig.*, No. 31.

² "It is a settled rule that a contract obtained by fraud is not void, but that the party defrauded has a right to avoid it, if he does so while matters can be replaced in their former position."—Per Lord Campbell, L. C., in *Re Royal British Bank (Mizer's Case)* (1859), 4 De G. & Jo. 575 at p. 586, quoted and adopted by Lord Chelmsford, L. C., in *Western Bank of Scotland v. Addie* (1867), 5 Macp. H.L. 80 at p. 84. See also *Houldsworth v. City of Glasgow Bank* (1880), 7 Ret. H.L. 53.

³ Leake on *Contract*, 3rd ed. p. 313.

⁴ Stair, i. 9. 14, iv. 35. 19; Ersk. iii. 1. 14-16, iv. 1. 27; Bankton, i. 10. 64-65; M. P. Brown, p. 404 *et seq.* See *Gourlay, etc. v. Watt* (1870), 9 Macp. 107.

⁵ In *Weir v. Bell* (1878), 3 Ex. Div. 238 at p. 243. The above passage was referred to and approved by Lord Herschell in *Derry v. Peek* (1889), 14 App. Cas. 337 at p. 372.

ment being fraudulent, there must always be an honest belief in its truth. . . . If fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."¹

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Where an owner of goods entrusts them to another who fraudulently sells them, it will depend upon the nature of the trust whether the property in the goods passes to a *bona-fide* buyer. "There must have been on the part of the original owner a consent to *sell*—not merely to yield up possession on some *causa* not capable, even when followed by delivery, of passing the property."²

Goods fraudulently sold by person not the true owner.

In Scotland, mere acceptance of goods by an insolvent was at one time deemed constructive fraud, entitling the seller to reduce the contract and annul the effect of delivery.³ This was varied in 1736 by the Court fixing three days prior to actual stoppage as a period during which there was a legal presumption of fraud.⁴ The rule *intra triduum* was, in turn, abolished by a House of Lords decision in 1790,⁵ and, in its place, stoppage *in transitu* was introduced into Scotland. It was established by the last-mentioned case that mere insolvency, apart from other circumstances, does not prevent a man from carrying on business and endeavouring to retrieve his losses, and that the acceptance of goods within a certain period of stoppage affords no special presumption of fraud, though it may be an element in the general proof.⁶

Old Scottish doctrine.

Introduction of stoppage *in transitu*.

¹ In *Derry v. Peek* (1889), 14 App. Cas. 337 at p. 374. According to Sir Frederick Pollock, the case of *Derry v. Peek* decides that "there is no general duty to use any degree whatever of diligence in ascertaining facts as distinct from bare belief, in making positive statements intended for other people to act on"—*Contract*, 6th ed. p. 504, note. Sir Frederick elsewhere speaks of the Directors' Liability Act 1890 (53 & 54 Vict. c. 64) as providing "a partial and clumsy remedy for the mischievous consequences of *Derry v. Peek*"—*Contract*, 6th ed. p. 533, note.

² Bell's *Com.* 7th ed. i. 261, Lord M'Laren's note.

³ See *Prince v. Pallat* (1680), Mor. 4932, and other cases in Appendix II. ii. (10) and iii. (7) *post*, pp. 319, 328.

⁴ *Inglis v. Royal Bank* (1736), Mor. 4937.

⁵ *Jaffrey, etc. v. Allan, Stewart, and Co.* (1790), 3 Pat. App. 191.

⁶ See Bell's *Com.* i. 265, and cases in Appendix II. ii. (10) and iii. (7) *post*, pp. 319, 328. *Campbell and Co. v. Shepherd* (1776), 2 Pat. App. 399, was a case of sale set aside on the ground of fraud by an insolvent. See Lord Mansfield's remarks, 2 Pat. App. at p. 462. As to whether it was necessary

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Effect of fraud
in Scotland.

Misrepresenta-
tion and
mistake—
Divergent
rules of law
and equity
in England.

Under the former law of Scotland the buyer had no claim for damages if he retained goods which he was entitled to reject. Where, however, the contract was fraudulent, the current of authority was to the effect that he might, if he pleased, retain the goods and yet claim damages.¹

"*Misrepresentation and mistake.*"—The law in England on this subject is involved with questions of law and equity, under rules which do not appear to run on the same lines. The doctrine of "Consideration," which does not apply to Scotland, also enters largely into the question whether the misrepresentation is of such a character as to justify rescission of the contract. "At law," said Lord Blackburn, "where there has been an innocent misrepresentation or misapprehension, it does not authorise a rescission, unless it is such as to show that there is a complete difference in substance between what was supposed to be, and what was, taken, so as to constitute a failure of consideration. . . . The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration."² It would seem that at law, even a *material* misrepresentation did not justify repudiation, but that in equity, the contract might be rescinded, even in the absence of such deceit or fraud as would found an action of damages against the wrongdoer. "When rescission is claimed, it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract having been obtained by misrepresentation cannot stand."³

to establish fraud at the date of the contract, or merely at the date of delivery, see *Ingis v. Royal Bank* (1736), Mor. 4937; *Wall v. Findlay* (1846), 8 D. 529. As to the effect of fraud on the part of a clerk of the seller in making out false returns of the value of a business without the seller's knowledge, and without pecuniary advantage to himself, see *Edinburgh United Breweries, Ltd. v. Nicholson's Trustees* (1893), 20 Ret. 581; Affd. (1894), 21 Ret. H.L. 10.

¹ See COM., Sect. 11 *ante*, p. 55.

² In *Kennedy v. Panama Mail Co.* (1867), L.R. 2 Q.B. 580 at p. 587. See as to "Consideration" Appendix III. *post*, p. 341.

³ Per Lord Herschell in *Derry v. Peek* (1889), 14 App. Ca. 337 at p. 359. See also Lord Bramwell to the same effect at p. 347.

In Scotland, misrepresentation and mistake are included in the phrase "*error in essentialibus*." In *Stewart v. Kennedy*¹ (1889-90) it was strongly urged on the authority of a passage in Bell's *Principles*, that it was sufficient for reduction that the contract was founded on "error in substantialis whether in fact or in law, provided reliance was placed on the thing mistaken;"² but, in the Court of Session, Lord President Inglis pointed out that "if this plea were listened to, every litigant who is unsuccessful in a question as to the construction and effect . . . of a contract, would at once have the remedy of reducing the contract which he had deliberately made and afterwards persistently misconstrued."³ In the House of Lords, Lord Herschell quoted these words with approval,⁴ and said in regard to the passage from Bell, that the fact that "no case can be pointed to in which the Courts have given relief upon the ground under consideration," satisfied him that it could not be the law of Scotland.⁵ Lord Watson put the matter thus: "In the case of onerous contracts reduced to writing, the erroneous belief of one of the contracting parties in regard to the nature of the obligations which he has undertaken will not be sufficient to give him the right [to rescind], unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract."⁶ Again, in *Menzies v. Menzies*⁷ (1893), Lord Watson said in regard to error, that it "becomes essential whenever it is shown that, but for it, one of the parties would have declined to contract. He cannot rescind unless his error was induced by the representations of the other contracting party or of his agent, made in the course of negotiation, and with reference to the subject matter of the contract. If his error is proved to have been so induced, the fact that the misleading representations were made in good faith, affords no defence against the remedy of rescission."⁸

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Analogous law of Scotland—*error in essentialibus*.*Dicta in Stewart v. Kennedy.**Menzies v. Menzies.*¹ C. of S. 16 Ret. 857; Affd. 17 Ret. H.L. 25.² Bell's *Prin.*, Sect. 11.³ 16 Ret. at p. 865.⁴ 17 Ret. H.L. at p. 27.⁵ *Ibid.*⁶ 17 Ret. H.L. at p. 29.⁷ 20 Ret. H.L. 108.⁸ 20 Ret. H.L. at p. 142. See also *Woods v. Tulloch* (1893), 20 Ret. 477,

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Sale or
security.

Law of
Scotland un-
settled by
M'Bain v.
Wallace.

Sub-section (4), excluding mortgage, pledge, etc., from the operation of the Act, opens up the question of the relation between sale and security. In Scotland, the law on this subject has been unsettled in recent years by the House of Lords judgment in *M'Bain v. Wallace*¹ (1881). Previously to that case, it was scarcely disputed* that no security over moveables was effectual without possession. The security might belong to one or other of two different categories. It might be an *ex-facie* absolute transfer of proprietary right, as in *Hamilton v. Western Bank*² (1856), in which case it would, on the principle of retention, carry future advances as well as those present and past; or, it might be an ordinary security for a present advance or for a specific existing debt. But in either case, a complete transfer by actual or constructive delivery to the security holder, was essential.³ The special relaxation

where Lord Kyllachy (Ordinary) said: "The error alleged was as to certain qualities of the subject which it is impossible to assert were either expressly or tacitly essential to the bargain" (p. 479). In *Edinburgh United Breweries, Ltd. v. Nicholson's Trustee* (1893), 20 Ret. 581; Affd. (1894), 21 Ret. H.L. 10, misrepresentation was alleged and founded on, but the question ultimately turned upon the pursuers' title to sue. ¹ 8 Ret. 360, Aff. 8 Ret. H.L. 106.

² 19 D. 152. "So far as I am aware, the practice of making advances on the security of a conveyance *ex facie* absolute qualified by a back letter, is not known in England, although well known in Scotland, and attended, according to the law of Scotland, with certain well-known consequences. On the other hand, the practice of taking an ordinary security title for future advances, as is done in England, cannot effectually be done in Scotland at all."—Per Lord Trayner in *National Bank v. Union Bank* (1885), 13 Ret. at p. 407. See also opinion of Lord President Inglis (13 Ret. at p. 409), which was afterwards characterised by Lord Halsbury, L. C., in the appeal as "an interesting historical retrospect" (14 Ret. H.L. at p. 1). The doctrine of *Hamilton v. Western Bank* was much discussed in *Alston's Trustees v. Royal Bank* (1893), 20 Ret. 887, and was referred to in the recent case of *Henderson and Co. v. Stewart and Others* (1894), 32 S.L.R. 120. A valuable *résumé* and criticism of cases affecting retention for debts subsequently contracted, will be found in Professor More's *Lectures*, vol. i. 405, 410.

³ *Heritable Securities Investment Association v. Wingate's Trustee* (1880), 7 Ret. 1094. See also *Concan v. Spence* (1824), 3 Sh. 28 (N.E. 42); *Wight v. Forman* (1828), 7 Sh. 177. "The law of Scotland does not recognise such a security as this, and no stipulation or contract between the parties can create such a security in competition with the rights of creditors. . . . The written contract here is a mere device, by means of which it is sought to hide the real nature of the contract, and to change its name without altering its nature."—Per Lord Gifford in *Cropper v. Donaldson* (1880), 7 Ret. 1108 at p. 1114. This, however, was a case of hire-purchase, where the price was secured by means of a condition suspending the passing of the property, and, in subsequent cases such circumstances were held to amount to actual sale, and not merely to security, e.g. *Murdoch and Co. Ltd. v. Greig* (1889), 16 Ret. 396. See Com., Sect. 17 *ante*, p. 83.

in favour of sale, introduced by the Scottish Mercantile Law Amendment Act of 1856,¹ was not supposed to apply to a transaction which, though in the form of a sale, was really a security. Hence, in *M'Bain's Case* which related to the transfer of a ship on the stocks in virtue of agreements which, taken together, amounted to a security, the attention of the Court of Session was exclusively directed to the question of constructive delivery. On the authority of the old case of *Simpson v. Duncanson's Creditors*² (1786) the Court found itself in a position to sustain the transaction as one in which the property had passed by means of the only delivery of which the subject was capable. The Mercantile Law Amendment Act was never once referred to, either in argument or in the opinions of the judges. But, in the House of Lords, it was all the other way. The case which had held undisputed sway in Scotland for a century was doubted, and the judgment of the House was founded entirely upon the Mercantile Law Amendment Act. The difficulty as between sale and security was got over by supposing the security to be something collateral to the sale, much in the same way as an English warranty is collateral to the contract while not forming part of it. Lord Selborne said: "The statute does not say that, there being a sale, that is to be taken out of the operation of the statute, because the parties may have some further contract, or agreement, or understanding *inter se*, with regard to the subject of the sale."³ Lord Blackburn doubted if the alleged security had ever been reduced to a contract, or amounted to more than a moral obligation qualifying the absolute character of the sale, but, he said, "Supposing there was a completed collateral contract, . . . a binding, legal, and enforceable contract that this should be a security, I do not see the slightest ground for saying that that undoes the effect of the Mercantile Law Amendment Act."⁴

These *dicta* cannot have been intended to throw doubt on the well-established rule of Scots law that possession is

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Effect of
Mercantile
Law Amend-
ment Act.

*Simpson v.
Duncanson's
Creditors.*

Reasoning of
House of
Lords in
*M'Bain's
Case.*

Lord Selborne.

Lord Black-
burn.

Contradictory
utterance in
House of
Lords in sub-
sequent case.

¹ 19 & 20 Vict. c. 60, Sects. 1 to 5.

² Mor. 14204. See *ante*, p. 96.

³ 8 Ret. H.L. at p. 109.

⁴ 8 Ret. H.L. at p. 114.

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In *M'Bain's Case* the substance of the transaction not regarded.

Subsequent Scottish judgment. *Allan's Trustee v. Gunn*.

necessary to the constitution of real contracts such as pledge or security. On the contrary, a few years later in a similar appeal from Scotland, Lord Blackburn said: "I think the agreement . . . is not an agreement for a sale at all, but an attempt to bargain for a pledge or security. A pledge or security without delivery of possession, is, I think, not good, and though in England a bill of sale under seal having that effect may be made, this is not a bill of sale."¹ The disturbing element in *M'Bain's Case* is that the grounds of judgment suggest that it is not necessary to look to the whole transaction to ascertain whether it is in its essence a security, and that it is sufficient if a form of a sale is adopted, and documents granted which would *per se* establish a sale if unqualified by "collateral agreements."² The application of the Mercantile Law Amendment Act to such circumstances, was, in effect, applying to a security a relaxation of the law of possession, which was clearly intended to apply to sale alone.

It is not surprising that this interpretation should have been adopted in Scotland. In *Allan and Co.'s Trustee v. Gunn and Co.*³ (1883) the Court of Session held that the Mercantile Law Amendment Act applied to goods bearing to be sold for a certain sum, but under condition that they were to be returned to the seller upon repayment of the amount. The so-called seller in this case retained the goods in his own possession for ten months, and only gave delivery after his sequestration.⁴ Lord Rutherford Clark expressed doubt as to the judgment, and said: "I fear great danger to the law in cases where parties resort to apparent transactions of sale in order to obtain a security which is not tolerated by the law of Scotland. I do not think, however, after the case of *M'Bain v Wallace* that I can differ."⁵ Again, in

¹ In *Seath and Co. v. Moore* (1886), 13 Ret. H.L. 57 at p. 61.

² "If a party should, under pretence of making a sale, in reality make a loan, it would merely be considered as a loan, although it were made with all the formalities of a sale."—Story on Sale, Sect. 223.

³ 10 Ret. 997.

⁴ A similar instance of *pactum de retrovendendo* occurred in *Latta v. Park and Co.* (1865), 3 Macp. 508, but with the very important difference that the goods were delivered to the purchaser at the time of the agreement.

⁵ 10 Ret. at p. 1000.

*Darling v. Wilson's Trustee*¹ (1887) the case of *M'Bain v. Wallace* was cited as an authority in circumstances which did not necessarily involve the Mercantile Law Amendment Act.² The subject of sale was pipes which passed under a road. "Delivery of them," said Lord Young, "by digging them up, handing them to the purchasers, and then replacing them in the ground, would have been ridiculous,"³ and therefore the real ground of judgment was that the subject of contract was delivered, so far as from its nature it was capable of delivery. If the delivery was effectual, it was of no consequence whether the contract was one of sale or of security.⁴ It was the ground of judgment in the Court of Session in *M'Bain's Case*, rather than that in the House of Lords, which formed the *ratio decidendi*, but it was the authority of the House of Lords which was cited in support. Lord Rutherford Clark said: "There is admittedly a judgment of the House of Lords against the reclaimer. That makes a simple ground of judgment. I was the Lord Ordinary in the case of *M'Bain*, and am bound now to confess that I was wrong in my judgment in it. While, however, I acknowledge my error, I do not perhaps see it so plainly as I should do."⁵ In *Liquidator of West Lothian Oil Co. v. Mair*⁶ (1892) the question chiefly turned on whether delivery had been actually given. It was decided that the delivery was effectual, and therefore the judgment did not require to rest on special privilege arising from the transaction being in the form of a sale. But the Mercantile Law Amendment Act was founded on and sustained, as an alternative ground of judgment, and several of the judges were disposed to look upon the transaction as a *bond-fide* sale, and not in any respect a security. Lord Young, who gave the leading opinion, while agreeing that the circumstances amounted to an out and out sale,

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*Darling v.
Wilson's
Trustee.**West Lothian
Oil Co. v.
Mair.*¹ 15 Ret. 180.² The report bears no reference to the Mercantile Law Amendment Act, except in the rubric of the reporter.³ 15 Ret. at p. 184.⁴ "There is here no doubt as to what the contract was. The object was to give Wilson a certain sum on security of the pipes, and it was necessary, in order to do that, that there should be an out and out sale" (*delivery*) "of the pipes."—Per Lord Jus.-Clk. Moncreiff, 15 Ret. at p. 183.⁵ 15 Ret. at p. 185.⁶ 20 Ret. 64.

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combated the view that, even if it had been a security, the lender's preference was invalid. Referring to *McBain's Case*, Lord Young said: "That argument was urged, but it was the opinion of this Court and also of the House of Lords, that where there was a party who was willing to accommodate another by advances of money, and a party desiring to be so accommodated by receiving the advances, there was nothing to prevent them entering into the relation of buyer and seller between themselves by a contract of sale, and that without any inconvenience, notwithstanding what the parties meant. What they did mean was to create the relation of buyer and seller between the borrower and lender, the advances being, by that contract, the price of the goods which the lender paid, and the goods being, by that contract, transferred to him as the buyer. It was held that that was perfectly legitimate—that the views of the parties in entering into the contract . . . did not prejudice the validity and effect of what the parties did. . . . To say that that is a loan transaction in the form of a sale, is language which may be criticised, but is good and convenient enough so long as it is quite understood. It is meant that the parties intended the relation of buyer and seller to be created by that contract of sale, *although the seller did not mean to part with all connection with the goods, and the buyer had not the usual intention of keeping them for his own use and enjoyment, or of selling them over again at a profit.*¹

*Pattison's
Trustee v.
Liston.*

In two recent cases relating to securities over household furniture, the Second Division gave opposite decisions upon very similar facts. In *Pattison's Trustee v. Liston*² (1893) the transaction was in the form of an absolute sale and assignation, but there was no sufficient legal delivery, and "it was clear beyond dispute that the transaction was one of loan on security." "We are dealing here," said Lord Trayner, "admittedly with a security and not a sale. Now it is quite certain that an effectual security over moveables can only be effected by delivery of the subject of the security. Nothing short of delivery will suffice. . . . The

¹ 20 Ret. 64 at pp. 68, 69.

² 20 Ret. 806.

mere statement that delivery has been given, or is hereby given, is not delivery nor equivalent to delivery.”¹ Lord Young dissented, and, consistently with his opinions in the cases already referred to, he founded his judgment entirely on *M'Bain's Case*, quoting at length the opinions of Lords Selborne, Blackburn, and Watson in support of the view that anything in the form of a sale sufficed to confer the privileges of the Mercantile Law Amendment Act, notwithstanding a collateral agreement that it was to be only a security. The other case referred to was that of *Liddell's Trustee v. Warr and Co.*² (1893), where Lord Young gave the leading opinion in favour of the validity of the transaction, and was in this instance supported by his colleagues on the ground “that there was a true sale, and therefore that the case of *M'Bain* applied.”³ It therefore becomes of importance to observe the facts which, in the opinion of the Court, constituted “a true sale” in the sense of *M'Bain's Case*. These were as follows:—A party applied to money-lenders for a loan of £250, which they agreed to give under the following documents, (1) an absolute assignation of household furniture bearing to be granted in implement of a sale at the price of £250, (2) an agreement by which the lenders hired the furniture to the borrower for three years at a rent which, in the time specified, fully repaid the sum lent with interest, and (3) a back letter signed by both lenders and borrower setting forth that the borrower was to have the furniture re-assigned to him when the half-yearly instalments (called in the lease, rent) were fully paid to the lenders. It was not disputed that the lenders “never had at any time any physical possession of the furniture or of the key of the house.” “The question is,” said Lord Young, “whether, and how far, you can impugn a contract by showing, by writing or by parole, that the true purpose of the parties was a transaction of loan. My opinion is that if the parties are acting honestly, and are *sui juris*, and not infringing any rule of bankruptcy law, they are at

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*Liddell's
Trustee v.
Warr.*¹ 20 Ret. at p. 813.² 20 Ret. 989.³ Per Lord Rutherford Clark, 20 Ret. at p. 995.

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liberty to enter into a contract of sale, though their purpose be to give security to one of them—a lender of money—which security can be given by that means, and cannot be given by pledge. . . . It appears to me that it is lawful and in the interest of the community that it should be possible for the parties to carry out their desire by means of a sale. . . . It is quite true that it is the general doctrine of Scots law that there cannot be a security over moveables *retenta possessione*. But the law is advancing, and the maxim that there can be no security over anything that is in the debtor's possession, has suffered considerably of late years. . . . I do not think that the case of *M'Bain* marked any great advance in the law, but it was an advance in what I hold to be the right direction.”¹

Effect of
present Act
upon doctrine
of *M'Bain v.*
Wallace.

It remains to consider the effect of the present Act upon *M'Bain v. Wallace*, as interpreted by the foregoing cases. The sections of the Mercantile Law Amendment Act upon which that judgment was founded have been repealed, and in their place, we have now in Scotland the English rule of passing the property, which to a large extent effects the same object by giving the purchaser of specific goods a proprietary right in the subjects of sale. But this proprietary right which, so far as Scotland is concerned, is entirely due to the present statute, does not extend “to any transaction in the form of a contract of sale, which is intended to operate by way of mortgage, pledge, charge, or other security.” It seems clear, therefore, that *M'Bain's Case* is no longer an authority, and that to render any security effectual, the subject must be completely delivered to the lender or pledgee.

Pledgee may
re-transfer to
true owner
under contract
of agency.

On the other hand, where goods are pledged and are delivered to the pledgee, either physically or by means of a document of title, it has been recently held by the House of Lords (overruling a judgment of the Second Division of the Court of Session) that there is nothing to prevent the pledgee re-transferring to the true owner under a distinct contract of agency for the purpose of sale. The Court of

¹ 20 Ret. at pp. 994, 995.

Session judgment proceeded on the ground that, while the pledgee would not have lost constructive possession by merely handing the goods or transferring the document of title to a *third party* as his agent for sale, it was otherwise where the agent thus appointed happened to be the true owner of the goods. In the House of Lords it was held (1) that the contract of pledge was entered into in England, and fell to be decided by English law where the rule contended for in the Scottish Court had no place, and (2) that the theory ran counter to everyday commercial practice, and could not be maintained as a proposition in the law of Scotland.¹

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62.—(1.) In this Act, unless the context or subject matter otherwise requires,—

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INTERPRE-
TATION OF
TERMS.

“Action” includes counterclaim and set off, and in Scotland condescendence and claim and compensation :

“*Condescendence and claim*” is the title applied to a claim in an action of “multiplepinding” (= Eng. “interpleader”). “*Compensation*” is the Scottish term for “set-off.”² The word “*action*” chiefly occurs in Part V. of the Act—Sect. 49 *et seq.*

“Bailee” in Scotland includes custodier :

This general declaration was inserted in Committee, and was intended to supersede the necessity for repeating “*custodier*” along with “*bailee*.” The word “*custodier*,” however, has not been deleted throughout the body of the Act. See Sects. 18, 19, 20, 41, 43, 45, and 46.

“Buyer” means a person who buys or agrees to buy goods :

¹ *North-Western Bank, Ltd. v. Poynter, etc.* (1894), 21 Ret. 513, Revd. H.L. 32 S.L.R. 245.

² *Bell's Com.* ii. 119.

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“Contract of sale” includes an agreement to sell as well as a sale :

See COM., Sect. 1 *ante*, p. 4.

“Defendant” includes in Scotland defender, respondent, and claimant in a multipointing :

“*Multipointing*” corresponds to an English “interpleader.”

“Delivery” means voluntary transfer of possession from one person to another :

Compare definition in Bills of Exchange Act 1882,¹ Sect. 2. The word “*voluntary*” is here added, and the words “*actual or constructive*,” which, in the definition referred to, are appended to “*possession*,” are here omitted. “Actual” and “constructive” merely express different modes of possession, and are therefore superfluous. It is to be noted, however, that delivery itself may be either actual or constructive. Thus, it is constructive when there is a change of possession without any change of actual custody,² *e.g.* where goods are transferred while held by a third person [Sect. 29 (3)], or where there is symbolical delivery by transfer of a bill of lading or otherwise.³ “*Possession*” is not defined in this Act, but a definition is attempted in the Factors Act 1889,⁴ Sect. 1 (2). Benjamin calls attention to the different meanings attached to “delivery,”⁵ but Chalmers suggests that it is “more correct to say that a delivery which is effectual for one purpose is ineffectual for other purposes. For instance, delivery to a carrier generally passes the property to the buyer, but does not defeat the right of stoppage *in transitu*, while delivery by the carrier to the consignee does defeat that right.”⁶

¹ 45 & 46 Vict. c. 61.

² Pollock and Wright on *Possession*, p. 46, and p. 72 *et seq.*

³ As to “symbolical delivery,” see COM., Sect. 28 *ante*, p. 133.

⁴ 52 & 53 Vict. c. 45.

⁵ Benjamin, pp. 677 and 768. See also COM., Sect. 29 *ante*, p. 137.

⁶ Chalmers on *Sale of Goods Act*, p. 109.

“Document of title to goods” has the same meaning as it has in the Factors Acts : Sect. 62.

See COM., Sect. 25 *ante*, p. 125, and Factors Act 1889, Sect. 1 (4). Text in Appendix I. *post*, p. 297.

“Factors Acts” mean the Factors Act, 1889,¹ the Factors (Scotland) Act, 1890,² and any enactment amending or substituted for the same :

See text of these Acts, Appendix I. *post*, pp. 296, 302.

“Fault” means wrongful act or default :

See Sects. 7, 9, and 20.

“Future goods” mean goods to be manufactured or acquired by the seller after the making of the contract of sale :

The same definition is contained in Sect. 5 (1) *ante*, p. 27, and see COM. *ante*, p. 30.

“Goods” include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale :

In the Stamp Act 1891,³ the expression used is “goods, wares, and merchandise,” following Sect. 17⁴ of the Statute of Frauds repealed by this Act. “Goods,” in this and most other statutes, include wares and

¹ 52 & 53 Vict. c. 45.

² 53 & 54 Vict. c. 40.

³ 54 & 55 Vict. c. 39, Sect. 111.

⁴ In the revised Statutes called Sect. 16. See Schedule to this Act *post*, p. 290, and Appendix III. *post*, p. 348, note.

Sect. 62.

merchandise. "*Moveables*" in Scotland, correspond to "*chattels personal*" in England, and "*corporeal moveables*" to "*chattels personal other than things in action*" (choses in action). "*Things in action*" are equivalent to "*incorporeal moveables*" in Scotland, and include debts, shares, scrip, bills, etc. "*Industrial growing crops*"¹ is the Scottish equivalent for "*emblemments*" (*fructus industriales*), but, possibly, the phrase though added in Committee in connection with the adaptation of the bill to Scotland, may embrace more than mere "*emblemments*," and may thus extend the scope of the original bill as applied to England and Ireland. The word "*emblemments*" appears to apply only to the ordinary produce or crop within the year of sowing,² while "*industrial growing crops*" may extend to a class of property which, both in England and Scotland, partakes of the nature of both real (heritable) and personal (moveable) estate. "There is," says Benjamin, "an intermediate class of products of the soil, not annual as emblemments, not permanent as grass or trees, but affording either no crop till the second or third year, or affording a succession of crops for two or three years before they are exhausted, such as madder, clover, teasles, etc."³ Questions, in England, on this subject, have chiefly arisen in connection with the Statute of Frauds, and it is said that "the law cannot be considered as settled."⁴ The term "*industrial growing crops*" seems, however, to comprehend the class of property referred to.

"Lien" in Scotland includes right of retention :

See COM., Sect. 39 *ante*, p. 186.

"Plaintiff" includes pursuer, complainer, claimant in a multiplepounding and defendant or defender counterclaiming :

Uniformity would have been preserved by inserting the words "in Scotland" before "pursuer," as in the case of "defender" *supra*, p. 284.

¹ Ersk. ii. 2. 4 ; Bell's *Com.* i. 187, ii. 2 ; Bell's *Prin.*, Sect. 1478—*Grant v. Smith* (1758), Mor. 9561 ; *Elder v. Allen* (1833), 11 Sh. 902.

² Per Cur in *Graves v. Weld* (1833), 5 B. & Ad. 105 ; Stephen's *Com.*, 10th ed. ii. 231 ; Williams on *Executors*, 9th ed. p. 625.

³ Benjamin, p. 125.

⁴ Benjamin, p. 128.

“Property” means the general property in goods, Sect. 62. and not merely a special property :

See COM., Sect. 1 *ante*, p. 5.

“Quality of goods” includes their state or condition :

See Sect. 14 *ante*, p. 66.

“Sale” includes a bargain and sale as well as a sale and delivery :

See Sect. 1 note (a) *ante*, p. 2, and COM. *ante*, p. 4.

“Seller” means a person who sells or agrees to sell goods :

“Specific goods” mean goods identified and agreed upon at the time a contract sale is made :

See Sects. 6, 7, 17, 18, 19. Where the contract is for specific goods, it will not be fulfilled by delivery of other goods, though of equal or superior quality.¹

“Warranty” as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

See Sects. 11 and 53, and COM., Sect. 11 *ante*, p. 52.

(2.) A thing is deemed to be done “in good faith”

¹ *Allason v. Watson* (1757), Mor. 14246; *Thomson Brors. v. Thomson* (1885), 13 Ret. 88.

Sect. 62.

within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

The same definition forms Sect. 90 of the Bills of Exchange Act 1882.¹ It seems confirmed by the House of Lords judgment in *Derry v. Peek*² (1889). See COM., Sect. 61 *ante*, p. 272.

(3.) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

See Sects. 39, 41, and 44. The Companies Act 1862,³ Sect. 80, contains criteria as to when a company is to be deemed unable to pay its debts. Insolvency, in the above definition, is "*practical*" as opposed to "*absolute*."⁴

"*Notour bankruptcy*" applies only to Scotland. It has been created by statute,⁵ and has been described as "a status indicating insolvency of a public or notorious description, and having attached to it certain definite legal effects. The notour bankrupt is a person who is not only insolvent, but whose insolvency is made known to the public by steps of legal diligence having been taken against him for the recovery of debt."⁶ Notour bankruptcy is a pre-requisite of sequestration where the application is at the instance of a creditor, and it is constituted by sequestration where the application is at the instance of a debtor who is not already notour bankrupt. It is also a pre-requisite in the process of *cessio bonorum*. The period within which preferences to particular creditors may be reduced, and within which diligences by creditors

¹ 45 & 46 Vict. c. 61. See *Jones v. Gordon* (1877), 2 App. Ca. 616.—Per Lord Blackburn at p. 628.

² 14 App. Ca. 337.

³ 25 & 26 Vict. c. 89.

⁴ See Goudy on *Bankruptcy*, p. 18.

⁵ 1696, c. 5; 19 & 20 Vict. c. 79, Sects. 7, 8, 9; 43 & 44 Vict. c. 34, Sect. 6.

⁶ Goudy on *Bankruptcy*, p. 65.

are equalised, is reckoned from the date of notour bankruptcy. It does not, however, of itself effect a distribution of the debtor's estates, which can only be done by sequestration, or cessio, or under a voluntary trust-deed or composition arrangement. In some respects it is analogous to an act of bankruptcy in England, just as sequestration corresponds to an adjudication of bankruptcy. Partnerships may be rendered notour bankrupt, and even public incorporated companies to the effect of equalising diligences,¹ but such companies cannot be sequestrated.² **Sect. 62.**

(4.) Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

See Sects. 18 and 29. Compare "fit or ready for delivery" in Sect. 4 (2).

63. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.^(a) **Sect. 63.**
COMMENCEMENT.

NOTE.

(a) Owing to unexpected delay in adjusting the respective amendments of the Lords and the Commons, the date for commencement fixed in the bill had passed before the Royal Assent could be obtained. The date could not be altered without a new bill, and thus the Act became unintentionally retrospective. Royal Assent was given on 20th February 1894.

64. This Act may be cited as the Sale of Goods Act 1893. **Sect. 64.**
SHORT TITLE.

¹ *Clarke v. Hinde, Milne, and Co.* (1884), 12 Ret. 347.

² *Standard Invest. Co. v. Dunblane Hydro. Co.* (1884), 12 Ret. 328.

SCHEDULE.

(See Sect. 60 *ante*, p. 268.)

This schedule is to be read as referring to the revised edition of the statutes prepared under the direction of the Statute Law Committee.

ENACTMENTS REPEALED.

Session and Chapter.	Title of Act and Extent of Repeal.
1 Jac. I. c. 21 . .	An Act against Brokers. The whole Act.
29 Cha. II. c. 3 . .	An Act for the prevention of frauds and perjuries. In part ; that is to say, sections fifteen and sixteen.*
9 Geo. IV. c. 14 . .	An Act for rendering a written memorandum necessary to the validity of certain promises and engagements. In part ; that is to say, section seven.
19 & 20 Vict. c. 60 .	The Mercantile Law Amendment (Scotland) Act, 1856. In part ; that is to say, sections one, two, three, four, and five.
19 & 20 Vict. c. 97 .	The Mercantile Law Amendment Act, 1856. In part ; that is to say, sections one and two.

* Commonly cited as sections sixteen and seventeen.

APPENDIX I.—STATUTES.

EXCERPTS FROM THE STATUTE OF FRAUDS¹ (1677).

(29 CAR. II. c. 3.)

An Act for Prevention of Frauds and Perjuries.

Sect. 4.—And be it further enacted by the authority aforesaid that from and after the said four and twentieth day of June (1677) no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.

Promises and agreements by parol.

Sect. 17.²—And be it further enacted by the authority aforesaid that from and after the said four and twentieth day of June (1677) no contract for the sale of any goods, wares, or merchan-

Contracts for sale of goods for ten pounds or more.

¹ The Statute of Frauds does not apply to Scotland. See Notes, Appendix III. *post*, p. 345.

² This section appears as Sect. 16 in the Revised Statutes, and is repealed by the Sale of Goods Act, Sect. 60, and relative Schedule, *ante*, p. 290. It is reproduced in a slightly different form in Sect. 4 of the Sale of Goods Act. See NOTE (h) *ante*, p. 27.

dises, for the price of ten pounds sterling or upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give some thing in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised.

EXCERPT FROM LORD TENTERDEN'S ACT¹ (1828).

(9 GEO. IV. c. 14)

An Act for rendering a written memorandum necessary to the validity of certain promises and engagements.

[29 Car. II.
c. 3.]

Sect. 7.—And whereas by an Act passed in England in the twenty-ninth year of the reign of King Charles the Second, intituled an Act for the prevention of frauds and perjuries, it is, among other things, enacted that from and after the 24th day of June 1677, no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised. And whereas a similar enactment is contained in an Act passed in Ireland in the seventh year of the reign of King William the Third: And whereas it has been held, that the said recited enactments do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied: and it is expedient to extend the said enactments to such executory contracts:

[Irish Act, 7
William III.
c. 12.]

Be it enacted, That the said enactments shall extend to all

¹ This Act does not apply to Scotland. The section here quoted is repealed by the Sale of Goods Act, Sect. 60, and relative Schedule, *ante*, p. 290, but is reproduced in Sect. 4 of that Act. See NOTE (h) *ante*, p. 27.

contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery.

Recited Acts extended to contracts for goods of £10 or upwards, although the delivery be not made.

THE BILLS OF LADING ACT 1855.¹

(18 & 19 VICT. c. 111.)

An Act to amend the Law relating to Bills of Lading.

[14th August 1855.]

Whereas by the custom of merchants a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property; And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed, have not been laden on board, and it is proper that such bills of lading in the hands of a *bonâ-fide* holder for value, should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid: Be it therefore enacted as follows:—

1.—Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Rights under bills of lading to vest in consignee or endorsee.

2.—Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such

Not to affect right of stoppage *in transitu* or claims for freight.

¹ See COM., Sect. 25 *ante*, p. 126.

consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

Bill of lading in hands of consignee, etc., conclusive evidence of the shipment as against the master, etc.

3.—Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board; provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

PREAMBLE AND REPEALED SECTIONS OF
THE MERCANTILE LAW AMENDMENT ACT,
SCOTLAND, 1856.¹
(19 & 20 VICT. c. 60.)

Preamble.

Whereas inconvenience is felt by persons engaged in trade by reason of the laws of *Scotland* being in some particulars different from those of *England* and *Ireland* in matters of common occurrence in the course of such trade, and with a view to remedy such inconvenience it is expedient to amend the law of *Scotland* as hereinafter is mentioned: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Sections repealed by Sale of Goods Act.

1.—From and after the passing of this Act, where goods have

Goods sold, but not delivered, not to be attachable by creditors of the seller.

¹ Sections 1 to 5 repealed by Sale of Goods Act, Sect. 60, and relative Schedule.

been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall from and after the date of such sale be attachable by or transferable to the creditors of the purchaser.

2.—Where a purchaser of goods who has not obtained delivery thereof shall after the passing of this Act sell the same, the purchaser from him or any other subsequent purchaser shall be entitled to demand that delivery of the said goods shall be made to him and not to the original purchaser; and the seller, on intimation being made to him of such subsequent sale, shall be bound to make such delivery, on payment of the price of such goods, or performance of the obligations or conditions of the contract of sale, and shall not be entitled, in any question, with a subsequent purchaser, or others in his right, to retain the said goods for any separate debt or obligation alleged to be due to such seller by the original purchaser: Provided always, that nothing in this Act contained shall prejudice or affect the right of retention of the seller for payment of the purchase price of the goods sold, or such portion thereof as may remain unpaid, or for performance of the obligations or conditions of the contract of sale, or any right of retention competent to the seller, except as between him and such subsequent purchaser, or any such right of retention arising from express contract with the original purchaser.

Seller not entitled to a right of retention generally against second purchaser.

3.—Any seller of goods may attach the same while in his own hands or possession, by arrestment or poinding, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

Arrestment and poinding of goods by seller.

4.—Nothing hereinbefore contained shall prejudice or affect the landlord's right of hypothec and sequestration for rent.

Rights of landlord not to be affected.

Seller not held to warrant goods, except there be an express warranty in contract.

5.—Where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose.

EXCERPT FROM THE MERCHANDISE MARKS ACT 1887.

(50 & 51 VICT. c. 28.)

An Act to consolidate and amend the Law relating to Fraudulent Marks on Merchandise.

[23rd August 1887.]

Sect. 17.¹—On the sale or in the contract for the sale of any goods to which a trademark, or mark, or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trademark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee.

THE FACTORS ACT 1889.

(52 & 53 VICT. c. 45.)

An Act to amend and consolidate the Factors Acts.

[26th August 1889.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

¹ See Sale of Goods Act, Sect. 14, note (b) *ante*, p. 67.

Preliminary.

1.—For the purposes of this Act—

(1) The expression “mercantile agent” shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods : Definitions.

(2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf :

(3) The expression “goods” shall include wares and merchandise :

(4) The expression “document of title” shall include any bill of lading, dock warrant, warehouse-keeper’s certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented :

(5) The expression “pledge” shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability.

(6) The expression “person” shall include any body of persons corporate or unincorporate.

Dispositions by Mercantile Agents.

2.—(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same ; provided that the person taking under the disposition acts in good faith, and has not at the time of Powers of mercantile agent with respect to disposition of goods.

the disposition notice that the person making the disposition has not authority to make the same.

(2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4) For the purpose of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

3.—A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

4.—Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

5.—The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

6.—For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or

Effect of
pledges of
documents
of title.
Pledge for
antecedent
debt.

Rights ac-
quired by
exchange of
goods or
documents.

Agreements
through
clerks, etc.

pledge on his behalf shall be deemed to be an agreement with the agent.

7.—(1) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

Provisions as to consignors and consignees.

(2) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent.

Dispositions by Sellers and Buyers of Goods.

8.—Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

Disposition by seller remaining in possession.

9.—Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

Disposition by buyer obtaining possession.

10.—Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and

Effect of transfer of documents on vendor's lien or right of stoppage in transitu.

that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu.

Supplemental.

Mode of transferring documents.

11.—For the purposes of this Act, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

Saving for rights of true owner.

12.—(1) Nothing in this Act shall authorise an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

(2) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set off on the part of the buyer against the agent.

Saving for common law powers of agent.

13.—The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act.

Repeal.

14.—The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act, but this repeal shall not affect any right acquired or liability incurred

before the commencement of this Act under any enactment hereby repealed.

15.—This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.

16.—This Act shall not extend to Scotland.

17.—This Act may be cited as the Factors Act 1889.

Commence-
ment.

Extent of
Act.

Short title.

SCHEDULE.

Enactments Repealed.

Session and Chapter.	Title.	Extent of Repeal.
4 Geo. IV. c. 83.	An Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandises entrusted to factors or agents.	The whole Act.
6 Geo. IV. c. 94.	An Act to alter and amend an Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandise entrusted to factors or agents.	The whole Act.
5 & 6 Vict. c. 39.	An Act to amend the law relating to advances bonâ fide made to agents entrusted with goods.	The whole Act.
40 & 41 Vict. c. 39.	An Act to amend the Factors Acts.	The whole Act.

THE FACTORS (SCOTLAND) ACT 1890.

(53 & 54 VICT. C. 40.)

An Act to extend the Provisions of the Factors Act 1889 to Scotland.

[14th August 1890.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Application
of 52 & 53
Vict. c. 45 to
Scotland.

1.—Subject to the following provisions, the Factors Act 1889, shall apply to Scotland :—

(1) The expression "lien" shall mean and include right of retention; the expression "vendor's lien" shall mean and include any right of retention competent to the original owner or vendor; and the expression "set off" shall mean and include compensation.

(2) In the application of section five of the recited Act, a sale, pledge, or other disposition of goods shall not be valid unless made for valuable consideration.

Short title.

2.—This Act may be cited as the Factors (Scotland) Act 1890.

EXCERPTS FROM THE STAMP ACT 1891.

(54 & 55 VICT. C. 39.)

An Act to consolidate the Enactments granting and relating to the Stamp Duties upon Instruments and certain other enactments relating to Stamp Duties.

[21st July 1891.]

Agreements.

Duty may be
denoted by
adhesive
stamp.

22. The duty of sixpence upon an agreement may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed.

Bills of Lading.

Bills of
lading.

40.—(1) A bill of lading is not to be stamped after the execution thereof.

(2) Every person who makes or executes any bill of lading not duly stamped shall incur a fine of fifty pounds.

Delivery Orders.

69.—(1) For the purposes of this Act the expression “delivery order” means any document or writing entitling, or intended to entitle, any person therein named, or his assigns, or the holder thereof, to the delivery of any goods, wares, or merchandise of the value of forty shillings or upwards lying in any dock or port, or in any warehouse in which goods are stored or deposited on rent or hire, or upon any wharf, such document or writing being signed by or on behalf of the owner of such goods, wares, or merchandise, upon the sale or transfer of the property therein.

Provisions as to duty on delivery order.

(2) A delivery order is to be deemed to have been given upon a sale of, or transfer of the property in, goods, wares, or merchandise of the value of forty shillings or upwards, unless the contrary is expressly stated therein.

(3) The duty upon a delivery order may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is made, executed, or issued.

70.—(1) If any person—

- (a) Untruly states, or knowingly allows to be untruly stated, in a delivery order, either that the transaction to which it relates is not a sale or transfer of property, or that the goods, wares, or merchandise to which it relates are not of the value of forty shillings; or
- (b) Makes, signs, or issues any delivery order chargeable with duty, but not being duly stamped; or
- (c) Knowingly, either himself, or by his servant or any other person, delivers, or procures, or authorises the delivery of, any goods, wares, or merchandise mentioned in any delivery order which is not duly stamped, or which contains to his knowledge any false statement with reference either to the nature of the transaction, or the value of the goods, wares, or merchandise,

Penalty for use of unstamped or untrue order.

he shall incur a fine of twenty pounds.

(2) But a delivery order is not, by reason of the same being unstamped, to be deemed invalid in the hands of the person

having the custody of, or delivering out, the goods, wares, or merchandise therein mentioned, unless such person is proved to have been party or privy to some fraud on the revenue in relation thereto.

By whom
duty on de-
livery order
to be paid.

71. The duty upon a delivery order is, in the absence of any special stipulation, to be paid by the person to whom the order is given, and any person from whom a delivery order chargeable with duty is required may refuse to give it, unless or until the amount of the duty is paid to him.

Receipts.

Provisions as
to duty upon
receipts.

101.—(1) For the purposes of this Act the expression “receipt” includes any note, memorandum, or writing whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person.

(2) The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.

Terms upon
which receipts
may be
stamped after
execution.

102. A receipt given without being stamped may be stamped with an impressed stamp upon the terms following; that is to say,

(1) Within fourteen days after it has been given, on payment of the duty and a penalty of five pounds;

(2) After fourteen days, but within one month, after it has been given, on payment of the duty and a penalty of ten pounds;

and shall not in any other case be stamped with an impressed stamp.

103. If any person—

(1) Gives a receipt liable to duty and not duly stamped; or

(2) In any case where a receipt would be liable to duty refuses to give a receipt duly stamped; or

(3) Upon a payment to the amount of two pounds or upwards

Penalty for
offences in
reference to
receipts.

gives a receipt for a sum not amounting to two pounds, or separates or divides the amount paid with intent to evade the duty ;
he shall incur a fine of ten pounds.

Warrants for Goods.

111.—(1) For the purposes of this Act the expression “warrant for goods” means any document or writing, being evidence of the title of any person therein named, or his assigns, or the holder thereof, to the property in any goods, wares, or merchandise lying in any warehouse or dock, or upon any wharf, and signed or certified by or on behalf of the person having the custody of the goods, wares, or merchandise.

Provisions as
to warrants
for goods.

(2) The duty upon a warrant for goods may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is made, executed, or issued.

(3) Every person who makes, executes, or issues, or receives or takes by way of security or indemnity, any warrant for goods not being duly stamped, shall incur a fine of twenty pounds.

FIRST SCHEDULE.

AGREEMENT or any MEMORANDUM of an AGREEMENT, made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument . 0 0 6

Exemptions.

- (1) Agreement or memorandum the matter whereof is not of the value of 5*l*.
- (2) Agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant.
- (3) Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise.

BILL OF LADING of or for any goods, merchandise, or effects to be exported or carried coastwise	. 0 0 6
And <i>see</i> section 40.	
DELIVERY ORDER 0 0 1
And <i>see</i> sections 69, 70, and 71.	
DOCK WARRANT. See WARRANT FOR GOODS.	
RECEIPT given for, or upon the payment of, money amounting to 2 <i>l.</i> or upwards 0 0 1

Exemptions.

- (8) Receipt written upon a bill of exchange or promissory note duly stamped, or upon a bill drawn by any person under the authority of the Admiralty, upon and payable by the Accountant General of the Navy.
- (9) Receipt given upon any bill or note of the Bank of England or the Bank of Ireland.
- (11) Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned.

WARRANT FOR GOODS 0 0 3
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Exemptions.

- (1) Any document or writing given by an inland carrier acknowledging the receipt of goods conveyed by such carrier.
- (2) A weight note issued together with a duly stamped warrant, and relating solely to the same goods, wares, or merchandise.
And *see* section 111.

EXCERPTS FROM MERCHANT SHIPPING ACT 1894.

(57 & 58 VICT. c. 60.)

(See Sale of Goods Act, Sect. 3, *ante* pp. 17, 20.)*Procedure for Registration.*

5.—Every registrar of British ships shall keep a book to be called the register book, and entries in that book shall be made in accordance with the following provisions : Register book.

- (i.) The property in a ship shall be divided into sixty-four shares.
- (ii.) Subject to the provisions of this Act with respect to joint owners or owners by transmission, not more than sixty-four individuals shall be entitled to be registered at the same time as owners of any one ship ; but this rule shall not affect the beneficial title of any number of persons or of any company represented by or claiming under or through any registered owner or joint owner :
- (iii.) A person shall not be entitled to be registered as owner of a fractional part of a share in a ship ; but any number of persons not exceeding five may be registered as joint owners of a ship or of any share or shares therein :
- (iv.) Joint owners shall be considered as constituting one person only as regards the persons entitled to be registered, and shall not be entitled to dispose in severalty of any interest in a ship, or in any share therein in respect of which they are registered :
- (v.) A corporation may be registered as owner by its corporate name.

10.—(1) On the first registry of a ship the following evidence shall be produced in addition to the declaration of ownership ;— Evidence on first registry.

- (a) In the case of a British-built ship, a builder's certificate, that is to say, a certificate signed by the builder of the ship, and containing a true account of the proper denomination and of the tonnage of the ship, as estimated by him, and of the time when and the place

where she was built, and of the name of the person (if any) on whose account the ship was built, and if there has been any sale, the bill of sale under which the ship, or a share therein, has become vested in the applicant for registry.

Transfers and Transmissions.

Transfer of
ships or
shares.

24.—(1) A registered ship or a share therein (when disposed of to a person qualified to own a British ship) shall be transferred by bill of sale.

(2) The bill of sale shall contain such description of the ship as is contained in the surveyor's certificate, or some other description sufficient to identify the ship to the satisfaction of the registrar, and shall be in the form marked A in the first part of the First Schedule to this Act, or as near thereto as circumstances permit, and shall be executed by the transferor in the presence of, and be attested by, a witness or witnesses.

Registry of
transfer.

26.—(1) Every bill of sale for the transfer of a registered ship or of a share therein, when duly executed, shall be produced to the registrar of her port of registry, with the declaration of transfer, and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share, and shall endorse on the bill of sale the fact of that entry having been made, with the day and hour thereof.

(2) Bills of sale of a ship or of a share therein shall be entered in the register book in the order of their production to the registrar.

Power of court
to prohibit
transfer.

30.—Each of the following courts, namely :—

(a) In England or Ireland the High Court,

(b) in Scotland the Court of Session,

(c) in any British possession the court having the principal civil jurisdiction in that possession ; and

(d) in the case of a port of registry established by Order in Council under this Act, the British court having the principal civil jurisdiction there,

may, if the court think fit (without prejudice to the exercise of any other power of the court), on the application of any interested person make an order prohibiting for a time specified any dealing with a ship or any share therein, and the court

may make the order on any terms or conditions they think just, or may refuse to make the order, or may discharge the order when made, with or without costs, and generally may act in the case as the justice of the case requires; and every registrar, without being made a party to the proceeding, shall on being served with the order or an official copy thereof obey the same.

Trusts and Equitable Rights.

56.—No notice of any trust, express, implied, or constructive, shall be entered in the register book or be receivable by the registrar, and, subject to any rights and powers appearing by the register book to be vested in any other person, the registered owner of a ship or of a share therein shall have power absolutely to dispose in manner in this Act provided of the ship or share, and to give effectual receipts for any money paid or advanced by way of consideration.

Notice of trusts not received.

57.—The expression “beneficial interest,” where used in this Part of this Act, includes interests arising under contract and other equitable interests; and the intention of this Act is, that without prejudice to the provisions of this Act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by this Act on registered owners and mortgagees, and without prejudice to the provisions of this Act relating to the exclusion of unqualified persons from the ownership of British ships, interests arising under contract or other equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interest therein in the same manner as in respect of any other personal property.

Equities not excluded by Act.

Returns, Evidence, and Forms.

65.—(1) The several instruments and documents specified in the second part of the First Schedule to this Act shall be in the form prescribed by the Commissioners of Customs, with the consent of the Board of Trade, or as near thereto as circumstances permit; and the Commissioners of Customs may, with the consent of the Board of Trade, make such alterations in the

Forms of documents, and instructions as to registry.

forms so prescribed, and also in the forms set out in the first part of the said Schedule, as they may deem requisite.

(2) A registrar shall not be required without the special direction of the Commissioners of Customs to receive and enter in the register book any bill of sale, mortgage, or other instrument for the disposal or transfer of any ship or share, or any interest therein, which is made in any form other than that for the time being required under this Part of this Act, or which contains any particulars other than those contained in such form ; but the said Commissioners shall, before altering the forms, give such public notice thereof as may be necessary in order to prevent inconvenience.

(3) The Commissioners of Customs shall cause the said forms to be supplied to all registrars under this Act for distribution to persons requiring to use the same, either free of charge, or at such moderate prices as they may direct.

(4) The Commissioners of Customs, with the consent of the Board of Trade, may also, for carrying into effect this Part of this Act, give such instructions to their officers as to the manner of making entries in the register book, as to the execution and attestation of powers of attorney, as to any evidence required for identifying any person, as to the referring to themselves of any question involving doubt or difficulty, and generally as to any act or thing to be done in pursuance of this Part of this Act, as they think fit.

FIRST SCHEDULE—PART I.

[The forms in this Part of the Schedule are subject to alteration from time to time by the Commissioners of Customs, with the consent of the Board of Trade.]

FORM A—BILL OF SALE.

(Particulars as to Name of Ship, Official Number, Port of Registry, Length, Breadth, Depth, Displacement, Engines (if any), Tonnage, etc., are to be here inserted.)¹

* in consideration of the Sum of _____
paid to † _____ by _____ the receipt
whereof is hereby acknowledged, transfer _____ shares in the
ship above particularly described, and in her boats, guns,
ammunition, small arms, and appurtenances, to the said _____

Further ‡ _____ the said _____ for § _____ heirs
covenant with the said _____ and || _____ assigns,
that ¶ _____ have power to transfer in manner aforesaid the
premises hereinbefore expressed to be transferred, and that the
same are free from incumbrances ** _____.

In witness whereof _____ ha _____ hereunto subscribed _____
name _____ and affixed _____ seal this _____ day of _____
One thousand eight hundred and _____.

Executed by the above-named _____ }
in the presence of _____ }

* "I" or
"we."
† "Me" or
"us."
‡ "I" or
"we."
§ "Myself and
my" or
"ourselves
and our."
|| "His,"
"her," or
"their."
¶ "I" or
"we."
** If there be
any subsisting
Mortgage or
outstanding
Certificate of
Mortgage, add
"save as ap-
pears by the
Registry of the
said Ship."²

¹ In Form A space is left for these particulars in detail.

² Form A has a marginal note as follows: "NOTE.—A Purchaser of a Registered British Vessel does not obtain a complete title until the Bill of Sale has been recorded at the Port of Registry of the Ship; and neglect of this precaution may entail serious consequences."

II.

POSSESSION OF MOVEABLES.

SCOTTISH CASES ILLUSTRATIVE OF POSSESSION OF MOVEABLES AND ITS LEGAL EFFECTS.

[NOTE.—Cases of doubtful interpretation, or involving more than one point of law, are included under separate headings, with cross references. Questions of trade lien arising from usage are in general excluded. See on this subject More's *Lectures*, vol. i. p. 402 *et seq.*]

I.—NATURE AND REQUISITES OF POSSESSION.

[NOTE.—The distinction between natural and civil possession is illustrated by many cases throughout the various headings. Cases of civil possession by means of a middleman, such as a warehouseman or carrier, will be found under IV. *post.*]

Taylor v. Ranken (1675), Mor. 9118 (possession by key of chest).

Lees v. Dinwiddy (1707), Mor. 2546 (creditor in accidental possession at death of debtor allowed to retain for debt).

Glendinning's Creditors v. Montgomery (1745), Mor. 2573 (creditor in possession through informal poinding allowed to retain for debt).¹

Burns v. Bruce and Baxter (1799), Hume 29 (horses in stable hired by clerk of company held to be in possession of company).

¹ This case is "undoubtedly erroneous, because to justify retention in any case, the possession must have been originally lawful." More's *Lectures*, ii. 403. See *Louison v. Craik* (1842), 4 D. 1452, per Lord Jus.-Clk. Hope at p. 1458.

I.—NATURE AND REQUISITES—*continued*.

More v. Dudgeon and Brodie (1801), Bell's *Com.* i. 186 and i. 193 (grain in seller's store—key with buyer's servant for sifting or airing—no possession by buyer). See also III. (4).

Paul v. Cuthbertson (1840), 2 D. 1286 (growing wood—symbolical delivery ineffectual).

Kerr v. Dundee Gas Co. (1861), 23 D. 343 (unfinished building-contract—materials on ground at contractor's bankruptcy held possessed by owner of premises).

Moore v. Gledden (1869), 7 Macp. 1016 (railway contract—plant on ground of railway company at date of contractor's bankruptcy held possessed by company in terms of contract).

Barr and Shearer v. Cooper (1873), 11 Macp. 651, Revd. (1875), 2 Ret. H.L. 14 (ship under repair—shipbuilder's possession not lost by removal of vessel from private slip to public wet-dock).

Hogg v. Armstrong and Mowat (1874), Shf. Ct. Glasgow, Guth. Sel. Ca., 1st ser. 438 (finder of £5 note in premises of shopkeeper entitled to retain against shopkeeper who was not true owner).

Miller v. Hutchison and Dixon (1881), 8 Ret. 489 (circumstances of possession of horses by auctioneers held sufficient for claim of retention for general balance).

Ross and Duncan v. Baxter and Co. (1885), 13 Ret. 185 (engines being fitted to ship in public harbour—no possession of ship by engineers).

Henckell du Buisson and Co. v. Swan and Co. (1889), 17 Ret. 252 (ship built for delivery at Santa Lucia lost on voyage—circumstances in which held that buyers had not taken possession (as alleged) before commencement of voyage).

Young v. Aktiebolaget Ofverums Bruk (1890), 18 Ret. 163 (iron stored by a ship's broker in shed of Harbour Commissioners, who had custody of key but did not keep any record of storages, held to be in possession of Commissioners). See also IV. (1).

West Lothian Oil Co. Ltd. v. Mair (1892), 20 Ret. 64 (empty barrels possessed by buyer by being placed in locked fence in seller's yard of which buyer received the key). See also IV. (1), and *COM. ante*, p. 279.

Brewer and Co. v. Duncan and Co. (1892), 20 Ret. 230 (ship being built—last instalment paid and builder's certificate granted

I.—NATURE AND REQUISITES—*continued*.

—vessel not removed but under control of buyer—held “handed over” in terms of contract).

Pattison's Trustee v. Liston (1893), 20 Ret. 806 (household furniture—alleged possession by means of key of house—plea negated). See also II. (4), and COM. *ante*, p. 280.

II.—RULE THAT POSSESSION OF MOVEABLES PRESUMES PROPERTY.

(But see now Sale of Goods Act, Sect. 17 *ante*, p. 80.)

(1) *Possession sustained as against alleged Ownership insufficiently proved.*

Home v. Atchison (1679), Mor. 9120 (necklace possessed eleven years).

Russel v. Campbell (1699), Fountainhall, ii. 75 (mere proof of former ownership of horse not sufficient).

Fergusson v. Officers of State (1749), Mor. 11618 (cattle in possession of person deceased).

Sharpe v. Smyth (1832), 11 Sh. 38 (thrashing-mill held *bond fide* for five years on imperfect title—possessor preferred to creditors of former owner).

Fife's Trustees (Earl of) v. Snare (1849), 11 D. 1119 (mere allegation that picture stolen forty years previous will not warrant application for its judicial custody).

See also as to proof required

Scot v. Fletcher (1665), Mor. 11616 (atlas alleged to have been lent, but claimed in property).

(2) *Creditors of Reputed Owner in Possession preferred.*

[NOTE.—Many cases of imperfect transfer involve the doctrine of reputed ownership. See especially under II. (4) *infra*.]

Turnbull v. Ker (1624), Mor. 11615 (cattle possessed for years under special condition as to grazing).

Breichan v. Muirhead (1810), Hume 215 (tavern effects claimed by wife and daughter of tavern-keeper in possession).

II.—RULE THAT POSSESSION PRESUMES PROPERTY—*continued*.

Cargill v. Somerville (1820), Hume 223 (goods in retail shop claimed by wife of possessor).

Anderson v. Buchanan (1848), 11 D. 270 (furniture sold without change in possession).

Brown v. Fleming (1850), 13 D. 373 (furniture claimed by wife under ante-nuptial contract).

Edmond v. Mowat (1868), 7 Macp. 59 (bathing machines sold without change in possession).

M'Caul's Trustees v. Thomson (1883), 10 Ret. 1064 (household furniture purchased from trustee for creditors, but allowed to remain in insolvent's possession—trustee in subsequent sequestration preferred). See also II. (5).

M'Gavin v. Sturrock's Trustee (1891), 18 Ret. 576 (farm lease creating security over moveables in favour of landlord—tenant's creditors preferred).

Hewat's Trustee v. Smith (1892), 19 Ret. 403 (pictures conveyed by husband in marriage-contract, *retenta possessione*—subsequent delivery in security preferred).

Anderson v. Anderson's Trustee (1892), 19 Ret. 684 (furniture sold by husband to wife held “inmixed” with his estate).

(3) *Landlord of Reputed Owner in Possession preferred in virtue of Hypothec.*

Kinneil v. Menzies (1790), Mor. 4973 (articles of furniture sold *bond fide* but allowed to remain with seller).

Wauchope v. Gall and Ross (1805), Hume 227 (furniture hired, but returned to owner before sequestration for rent).

Wilson v. Spankie (17th December 1813), F.C. (furniture of sequestrated bankrupt allowed by creditors to remain in bankrupt's house beyond current year—landlord preferred).

Stewart v. Bell (31st May 1814), F.C. (furniture hired—true owner, as assignee of landlord, preferred to tenant's cautioner for rent).

Penson and Robertson, Petitioners (6th June 1820), F.C. (musical instrument hired by tenant—plea that hypothec does not affect single or special articles repelled).

II.—RULE THAT POSSESSION PRESUMES PROPERTY—*continued.*

Nelmes and Co. v. Ewing (1883), 11 Ret. 193 (billiard-table hired by keeper of billiard-room).

Dickson v. Singer Manufacturing Co. (1886), Shf. Ct., Kirkcaldy, 30 Jour. of Juris. 658 (sewing-machine on hire-purchase).

Duncanson and Henderson v. Maver and Son (1894), Shf. Ct., Glasgow, 2 Scots Law Times 359 (pianoforte on hire-purchase to tenant's wife).

(4) *Effect denied to alleged Transfer retenta possessione.*

[NOTE.—Additional cases will be found under I. and under II. (1) and II. (2) *ante*, and (where goods in the hands of a middleman) under IV. (2) and IV. (4) *post*.]

Corbet v. Stirling (1666), Mor. 10602 (household plenishing—pounder preferred to prior latent disponee).

Ker v. Scot and Elliot (1695), Mor. 9122 (actual delivery of sheep preferred to prior symbolical delivery).

Carse v. Halyburton (1714), Mor. 9125 (household plenishing—pounder preferred to prior latent disponee).

Hills v. Buchanan (1785), Mor. 14200, Affd. H.L. (1786), 3 Pat. App. 47 (30 hhds. tobacco, of which eight delivered to insolvent buyer, but returned before actual bankruptcy—seller preferred to whole). See also III. (7).

Salter v. Knox's Factor (1786), Mor. 14202 (malt in seller's warehouse—price paid, quantity measured and set apart for buyer—seller's creditors preferred).

Arbuthnott v. Paterson (1798), Mor. 14220 (precepts for delivery of grain addressed to seller's tenants as custodiers, and in some cases acknowledged by them—seller preferred to buyer's creditors).

Brodie v. Todd and Co. (20th May 1814), F.C. (bill of lading sent to buyer on condition that acceptance sent in return—condition not fulfilled—goods retained by seller). See Sale of Goods Act, Sect. 19 (3).

Johnstone v. Sprott (1814), Hume 448 (conveyance in security of advances *retenta possessione* ineffectual against general creditors).

Taylor v. Jack (1821), 1 Sh. 133 (N.E. 139) (taking hold of horse's ears not constructive delivery). See also IV. (2).

II.—RULE THAT POSSESSION PRESUMES PROPERTY—*continued*.

Borthwick v. Grant (1829), 7 Sh. 420 (household furniture—pounder preferred to prior latent disponee).

Fraser v. Frisby (1830), 8 Sh. 982 (household furniture—pounder preferred to prior latent disponee).

Wyld and Co. v. Richardson (1832), 10 Sh. 538 (spirits in seller's bonded store—delivery order intimated to excise store-keeper—landlord's hypothec preferred).

Gibson v. May (1841), 3 D. 974 (pounder preferred to prior latent disponee).

Shearer v. Christie (1842), 5 D. 132 (creditor of husband preferred to wife founding on post-nuptial marriage contract revocable as donation *inter conjuges*).

Boak v. Megget (1844), 6 D. 662 (hides in seller's tanning pits).

Anderson v. Ford (1844), 6 D. 1315 (felled timber partly remaining on seller's lands). See also III. (5).

M'Naughton v. Baird and Co. (1852), 24 Sc. Jur. 623; 1 Stuart 1051 (iron sold and price paid—seller entitled to retain against sub-buyer for general balance due by original buyer).

Dryden and Co. v. Hamelin and Co. (1853); Bell's *Com.*, i. 243 (guano retained by seller—bill for price dishonoured).

Mathieson v. Alison (1854), 17 D. 274 (delivery order for spirits in seller's bonded warehouse—seller's creditors preferred), See *Com. ante*, p. 195.

M'Arthur v. Brown (1858), 20 D. 1232 (furniture, etc., purchased at auction under diligence, but allowed to remain on debtor's premises, held subject to pouncing of the ground).

Benton v. Craig (1864), 2 Macp. 1365 (moveable machinery of tenant assigned to creditor and assignation intimated to landlord, but possession retained).

Anderson v. M'Call (1866), 4 Macp. 765 (grain in owner's public store—delivery order in security of advance—transfer ineffectual).

Wright v. Mitchell (1871), 9 Macp. 516 (completed delivery to buyer—re-delivery to seller reduced under Bankruptcy Acts—buyer's creditors preferred). See also III. (6).

Stiven v. Scott and Simson (1871), 9 Macp. 923 [goods invoiced and partly delivered in security—general creditors preferred]. See also III. (6).

II.—RULE THAT POSSESSION PRESUMES PROPERTY—*continued.*

Clark and Co. v. West Calder Oil Co. (1882), 9 Ret. 1017 (moveables and plant of manufacturing company assigned without change in possession).

Seath and Co. v. Moore (1884), 12 Ret. 260; *Affid.* (1886), 13 Ret. H.L. 57 (machinery for ship in builder's yard). See also IV. (2), and COM. *ante*, p. 90.

Rhind's Trustee v. Robertson and Baxter (1891), 18 Ret. 623 (spirits in owner's bonded warehouse—delivery order in security of advance—transfer ineffectual).

Pattison's Trustee v. Liston (1893), 20 Ret. 806 (household furniture assigned in security—alleged delivery by means of key of house—general creditors preferred). See also I. and COM. *ante*, p. 280.

(5) *Effect denied to Condition suspensive of the Sale or of the Passing of the Property.*

Brown v. Marr, Barclay, etc. (1880), 7 Ret. 427 (jewellery—sale or return—pawned—pawnbrokers preferred). See COM. *ante*, p. 94.

Cropper and Co. v. Donaldson (1880), 7 Ret. 1108 (printing machine—hire-purchase—pointed by purchaser's creditors—creditors preferred).

M'Caul's Trustees v. Thomson (1883, 10 Ret. 1064 (household furniture—hire-purchase—purchaser's creditors preferred). See also II. (2).

Clarke and Co. v. Miller and Son's Trustee (1885), 12 Ret. 1035 [flax—payment by bill—acceptance of bill not suspensive condition). See also II. (10), and COM. *ante*, p. 102.

(6) *Effect given to Possession under Transfer by Fiduciary.*

Thomson v. Elies (1675), Mor. 9118 (moveables conveyed in trust by husband to wife—breach of trust—*bona-fide* purchaser from wife preferred to husband's heirs).

Attwood v. Kinnear (1832), 10 Sh. 817 (wines fraudulently transferred by purchasing agents in security of advance to them—security effectual).

II.—RULE THAT POSSESSION PRESUMES PROPERTY—*continued*.(7) *Effect given to Possession under Assignment in Security.*

Henry v. Robertson and Sime (1822), 1 Sh. 399 (N.E. 437),
(possessor preferred to assignor's creditor).

(8) *Effect given to Possession (although recent) as against Reputed Ownership of Seller.*

Walker v. Irwin and Co. (1841), 3 D. 985 (shop goods—former owner's name above door).

Miller's Trustee v. Shield (1862), 24 D. 821 (transaction challenged under Bankruptcy Acts, but sustained).

Allan and Co.'s Trustee v. Gunn and Co. (1883) [transaction challenged under Bankruptcy Acts, but sustained]. See also III. (4) and III. (8).

(9) *Effect given to Possession through Delivery Order.*

[NOTE.—The cases undernoted arose out of the same circumstances, and were decided at the same time and in the same manner by the Court of Session. Only *Pochin's Case* appears in the Court of Session Reports. *Vickers' Case* was appealed to the House of Lords, where the affirming judgment proceeded, not on possession (as in the Court of Session), but on the effect of an iron-warrant as a document of title under the Factors Act of 1842, Sect. 4. In the House of Lords opinions varied as to the effect of mere possession, Lord Watson emphatically affirming the Scottish principle. See now definition of "document of title" in Factors Act 1889, Sect. 1 (4) and Sale of Goods Act, Sect. 62 (1).]

Pochin and Co. v. Robinows and Marjoribanks (1869), 7 Macp. 622 (iron-warrant obtained by fraud and pledged—pledgee in possession of goods entitled to retain for advance).

Vickers v. Hertz (1871), 9 Macp. H.L. 65 (same as preceding case). See also IV. (1).

(10) *Effect given to Delivery, notwithstanding Buyer's Insolvency or alleged Fraud.*

Prince v. Pallat (1680), Mor. 4932 (wines shipped for buyer—

II.—RULE THAT POSSESSION PRESUMES PROPERTY—*continued*.
seller allowed to prove buyer's insolvency at date of order—
proof failed. See also IV. (4), and COM. *ante*, pp. 159,
204.

Inglis v. Royal Bank (1736), Mor. 4936 (grain delivered at
various dates). See also III. (7), and COM. *ante*, p. 214.

[NOTE.—Presumptive fraud *intra triduum* established by this case,
but overruled by the House of Lords in *Allan, Stewart, and
Co.'s Case*.]

Gordon v. Gardiner (1784), Mor. 4946 (copper stills purchased
three months before bankruptcy).

Allan, Stewart, and Co. v. Stein's Creditors (1790), Mor. 4949 ;
Rev. H.L. (1790), *sub nom. Jaffrey, etc. v. Allan, Stewart, and Co.*,
3 Pat. App. 191 (Court of Session held that presumption of
fraud where goods delivered within three days of bankruptcy.
House of Lords reversed, holding that fraud in all cases must
be proved). See also IV. (3).

Collins v. Marquis's Creditors (23rd November 1804), F.C., Mor.
14223 (cargo timber partly delivered into buyer's woodyard—
buyer's creditors preferred to the part delivered). See also III.
(7) and IV. (3).

Strachan v. Knox and Co.'s Trustee (21st January 1817), F.C.
(wines *ex ship*—bonded in name of buyer's agent). See also
IV. (4).

Richmond v. Railton (1854), 16 D. 403 (mere insolvency not
fraud—property in furniture held passed by delivery). See COM.
ante, p. 132.

Morton and Co. v. Abercromby (1858), 20 D. 362 (goods pur-
chased and shipped in buyer's name for Australian market—
bills of lading endorsed by buyer to third party—held delivery
complete). See also IV. (1) and IV. (4).

Ehrenbacher and Co. v. Kennedy (1874), 1 Ret. 1131 (aver-
ments of fraud by buyer, and prior creditor to whom goods
delivered, held irrelevant, there being no averment of *dolus dans
causam contractui* or of concerted fraud).

Clarke and Co. v. Miller and Son's Trustee (1885), 12 Ret. 1035
(flax delivered during consultations by buyer as to stopping
payment). See also II. (5), and COM. *ante*, p. 102.

II. RULE THAT POSSESSION PRESUMES PROPERTY—*continued*.

(11) *Seller (retenta possessione) or his Creditors preferred, notwithstanding Mercantile Law Amendment Act 1856.*

Wyper v. Harveys, etc. (1861), 23 D. 606 (whisky in seller's bonded warehouse—sub-sale not duly intimated—doubtful interpretation of Act). See *ante*, p. 92, note.

Sim v. Grant (1862), 24 D. 1033 (seller of horse retaining possession and use, with power to sell).

M'Meekin v. Ross (1876), 4 Ret. 154 (sale of scrap-iron lying in yard of shipbuilder or to be produced within a specified period—buyer no *jus ad rem specificam*).

Stewart v. Fraser and Co., etc. (1878), Shf. Ct., Glasgow, Guth. Sel. Ca. 2nd ser. 512 (wheat, part of larger quantity in store—delivery order countermanded by sellers before indorsee of buyers presented it to storekeeper).

(12) *Effect denied to Pledge or Security without Possession.*

Tod and Son v. Merchant Banking Co. of London, Ltd. (1883), 10 Ret. 1009 (bank holding bills of lading in security, and having control of goods, allowed part to be delivered under temporary arrangement). But see III. (1) and III. (2).

III. EXCEPTIONS TO RULE THAT POSSESSION OF MOVEABLES PRESUMES PROPERTY.

(1) *Presumption from Possession set aside by Contrary Proof.*

Hog v. Hamilton (1679), Mor. 9119 (moveables possessed by widow—claimed by nearest of kin).

Abercromby v. Story (1687), Mor. 11618 (moveables possessed by widow—claimed by children of first husband).

Warrender v. Alexander (1715), Mor. 10609 (goods for export—temporary custody).

Mackenzie v. Newall (1824), 3 Sh. 206 (accidental possession will not found claim of retention in security).

III. EXCEPTIONS TO PRESUMPTION OF PROPERTY—*continued.*

Louson v. Craik (1842), 4 D. 1452 (accidental possession will not found claim of retention in security).

North-Western Bank, Ltd. v. Poynter, Son, and Macdonalds (1894), 21 Ret. 513, Rev. H.L. 32 S.L.R. 245 (bills of lading held by bank in security, but handed back to pledgors as agents for the sale of the goods on behalf of pledgees—held that pledgees' possession had not been lost).

(2) *Effect denied to Plea of Reputed Ownership arising from Possession.*

i. *As against Creditors.*

[NOTE.—See also cases under III. (4).]

Eadie v. Young (1815), Hume 705 (horses and carts sold and afterwards leased by buyer to seller—buyer preferred to seller's creditors.) See also III. (4).

Gray and Co. v. Farquhar (1823), 2 Sh. 160 (N.E. 146) (former owner of ship in possession as manager—conditional obligation by new owner to re-convey—claim of creditor of former owner repelled).

M'Millan v. Price (1837), 15 Sh. 916 (household furniture not subject to diligence of creditors of liferenter).

Macdougall v. Whitelaw (1840), 2 D. 500 (household furniture of sister in house occupied by herself and her brother—reputed ownership of brother refused effect).

Fyfe v. Woodman (1841), 4 D. 255 (claim of daughters to household furniture sustained against reputed ownership of father).

Smith v. Flowerdew (1842), 5 D. 335 (claim of daughter to household furniture sustained against reputed ownership of mother).

Young v. Loudoun (1855), 17 D. 998 (furniture belonging to wife exclusive of *jus mariti*—reputed ownership of husband excluded).

Scott v. Scott's Trustee (1889), 16 Ret. 504 (furniture bought from trustee for creditors, insolvent retaining possession—buyer

III. EXCEPTIONS TO PRESUMPTION OF PROPERTY—*continued*.
 preferred to trustee in subsequent sequestration). See also III.
 (8).

Mitchell's Trustees v. Gladstone (1894), 21 Ret. 586 (furniture belonging to marriage-contract trustees and jointly possessed by spouses—trustees preferred to husband's assignee).

Adam v. Adam's Trustee (1894), 21 Ret. 676 (wife's furniture in joint possession of spouses—wife preferred to husband's creditors).

ii. *As against Landlord's Hypothec.*

Cowan v. Perry (1804), Bell's *Com.* ii. 30, note (furniture held by tenant on deposit or loan without hire—owner preferred to tenant's landlord).

Jaffray v. Carrick (1836), 15 Sh. 43 (tenant tortiously withholding furniture from true owner—owner preferred to tenant's landlord).

Adam v. Sutherland (1863), 2 Macp. 6 (furniture sold under crown diligence—allowed by buyer to remain in house—buyer preferred to landlord of former owner).

Milne v. Singer Manufacturing Co. (1881), Shf. Ct., Perth, 25 Jour. of Juris. 499 (sewing-machine on hire-purchase—owner preferred to hire-purchaser's landlord).

Singer Manufacturing Co. v. Docherty (1882), Shf. Ct., Hamilton, 26 Jour. of Juris. 445 (sewing-machine on hire-purchase—owner preferred to hire-purchaser's landlord).

Stevenson v. Donaldson (1884), Shf. Ct., Glasgow, 28 Jour. of Juris. 277 (pianoforte hired—owner preferred to hirer's landlord).

Wheeler and Wilson Co. v. M'Ritchie (1884), Shf. Ct., Dundee, 28 Jour. of Juris. 498 (sewing-machine on hire-purchase—owner preferred to hire-purchaser's landlord).

Watson v. Singer Manufacturing Co. (1884), Shf. Ct., Glasgow, 28 Jour. of Juris. 658 (sewing-machine hired—owner preferred to hirer's landlord).

Bell v. Andrews (1885), 12 Ret. 961 (pianoforte belonging to tenant's daughter [a minor residing with her father]—daughter preferred to landlord).

Gracie v. Pulsometer Engineering Co. Ltd. (1887), 24 S.L.R. 239

III. EXCEPTIONS TO PRESUMPTION OF PROPERTY—*continued*.
(engineering samples in agent's office—owner preferred to agent's landlord).

(3) *True Owner preferred to bonâ-fide Possessor under Title
a non domino.*

Beveridge v. Indwellers in Cupar (1583), Mor. 9111 (poinded cattle sold by public roup—decree reduced—purchasers obliged to restore. But see Bell's *Com.* i. 299, note).

Caitness (Bishop of) v. Fleshers in Edinburgh (1629), Mor. 9112 (stolen horse bought in public market).

Ferguson v. Forrest (1639), Mor. 9112 (stolen horse bought in public market).

Wright v. Butchart (1662), Mor. 9112 (fraudulent sale of furniture by lessee—buyer in constructive possession).

Ramsay v. Wilson (1666), Mor. 9113 (jewels pledged by custodier).

Simple v. Givan (1672), Mor. 9117 (heirship-moveables pledged by widow—claimed by heir).

Hay v. Leonard (1677), Mor. 10286 (spuilzie or robbery is *vitium inhærens* as well as theft).

Forsyth v. Kilpatrick (1680), Mor. 9120 (horse hired and fraudulently sold).

Campbell v. Christie (1682), Mor. 10608 (stolen cattle).

Pringles v. Gribton (1710), Mor. 9123 (jewels pledged by custodier).

Lesly v. Hunter (1752), Mor. 2660 (cloth in hands of bleacher who claimed to retain for general balance due by apparent owner).

Henderson v. Gibson (1806), Mor. Moveables, App. 1 (stolen cattle bought in public market).

Hart and Gemmell v. Panton and Co. (1861), Sh. Ct., Glasgow, Guthrie's Sel. Cases, 1st ser. 439 (watches fraudulently obtained and pledged—held theft, and true owner preferred).

Muir, Wood, and Co. v. Moore and Kidd (1876), Sh. Ct., Glasgow, Guthrie's Sel. Cases, 1st ser. 444 (piano lent on hire and pledged for advance—held theft, and owner entitled to vindicate possession).

III. EXCEPTIONS TO PRESUMPTION OF PROPERTY—*continued.*

Martinez y Gomez v. Allison (1890), 17 Ret. 332 (goods pledged by forwarding agent for his own antecedent debt).

Mitchell v. Heys and Sons (1894), 21 Ret. 600 (copper rollers obtained on loan and handed to bleacher who claimed to retain for his bleaching account—true owner preferred).

See also

Alexander v. Black (17th January 1816), F.C. (cattle, in custody for grazing, fraudulently sold in public market—opinion, but not decided that true owner could recover).

And see contra

Gordon v. Menzies (1687), Mor. 9122 (conditional effect given to sale of stolen article in public market).

Todd v. Armour (1882), 9 Ret. 901 (stolen horse—effect given to sale in market-overt in Ireland). See COM. *ante*, p. 113.

(4) *Effect given to Symbolical or Constructive Delivery without change in Possession.*

[NOTE.—See also cases under III. (2) i.]

Gray v. Cowie (1684), Mor. 9121 (symbolical possession preferred to actual possession under posterior disposition).

Grant v. Smith (1758), Mor. 9561 (growing corn). But see Sheriff Guthrie's note to Bell's *Prin.*, Sect. 1303, 9th ed. p. 808.

Simpson v. Duncanson's Creditors (1786), Mor. 14204 (ship on stocks). See COM. *ante*, pp. 96, 277.

Broughton v. Aitchisons (15th November 1809), F.C. (98 bolls wheat in seller's granaries, part of larger mass unseparated—8 bolls delivered—delivery order granted for remainder—buyer preferred to seller's creditors). Case doubted—see *ante*, p. 79, note.

Eadie v. Young (1815), Hume 705 (symbolical delivery of horses, etc.). See also III. (2).

Maxwell and Co. v. Stevenson and Co. (1830), 8 Sh. 618, Rev. H.L. (1831), 5 W. & S. 269 (delivery by key of warehouse).

Lang v. Bruce (1832), 10 Sh. 777 (cattle in seller's parks).

III. EXCEPTIONS TO PRESUMPTION OF PROPERTY—*continued*.

Gibson v. Forbes (1833), 11 Sh. 916 (bottled wine in seller's bins). See NOTE (e) *ante*, p. 88.

Henry v. Dunlop and Co. (1842), 5 D. 3 (cattle driven off by servants of seller and buyer—buyer induced by seller to believe that delivery given).

Dimmack v. Dixon (1856), 18 D. 428 (written obligation to deliver iron to party lodging document—indorsee preferred to unpaid grantor).

Bovill v. Dixon (1854), 6 D. 619; *Affid. H.L. (sub nom. Dixon v. Bovill)* (1856), 19 D. H.L. 9; 3 Macq. 1 (written obligation to deliver iron to party lodging document—held by Court of Session transferable without indorsation—reversed on this point, but affirmed on speciality).

Mitchell v. Major (1856), 19 D. 30 (furniture bought from trustee in bankruptcy, but remaining in bankrupt's possession—buyer preferred to new trustee).

Union Bank v. Mackenzie (1865), 3 Macp. 765 (tenants of mill assigned moveable machinery to landlords—landlords held to possess through tenants, and preferred to tenant's creditors).

Black v. Incorporation of Bakers (1867), 6 Macp. 136 (milling products vested in buyer as produced). See also 4 (1), and Sale of Goods Act, Sect. 18, COM. *ante*, p. 91.

Wylie and Lochhead v. Mitchell (1870), 8 Macp. 552 (hearse manufactured to order but undelivered—buyers held joint owners in respect of material contributed).

Orr's Trustee v. Tullis (1870), 8 Macp. 936 (newspaper plant sold and afterwards leased to seller, who retained possession—buyer preferred to creditors of seller).

Robertsons v. M'Intyre (1882), 9 Ret. 772 (lessee of manufactory sold moveable machinery to landlord, who afterwards leased it to seller).

Allan and Co.'s Trustee v. Gunn and Co. (1883), 10 Ret. 997 (nets sold for £100 under special contract of pre-emption—seller retained possession for ten months, and gave delivery after his sequestration—transaction alleged to be security not sale, but sustained against seller's trustee in bankruptcy). See II. (7) and III. (8), and also COM. *ante*, p. 278.

Darling v. Wilson's Trustee (1887), 15 Ret. 180 (underground

III. EXCEPTIONS TO PRESUMPTION OF PROPERTY—*continued*.

pipes sold for £400—alleged not sale but security—held that the only possession of which the property was capable had been given). See *COM. ante*, p. 279.

Liddell's Trustee v. Warr and Co. (1893), 20 Ret. 989 (household furniture sold, but retained by seller on contract of hire-purchase—alleged to be security not sale, but transaction sustained against seller's trustee in bankruptcy). See *COM. ante*, p. 281.

See also

Campbell v. Barry (1748), Elchies' Sale, No. 7 (cattle marked by buyer—left in seller's enclosures—risk with buyer).

More v. Dudgeon and Brodie (1801), Bell's *Com.* i. 186; i. 193 (grain in seller's store—key with buyer's servant for sifting or airing—no possession by buyer). See also I.

Duff v. Brown (14th February 1814), F.C.; Rev. H.L. (1817), 6 Pat. App. 332 (growing wood—special circumstances suggesting that purchaser had possession though wood not cut—purchaser of estate in the knowledge of previous sale of wood bound to give it effect).

Dunlop v. Lambert (1837), 15 Sh. 884 and 1232; Rev. (1839), 1 Rob. App. 663 (punchon of spirits shipped to buyer and lost during storm—Court of Session held as matter of law that possession and consequent risk with buyer—House of Lords held risk question of fact to be tried by jury). See Sale of Goods Act, Sect. 20, and *COM. ante*, p. 108.

Sutherland v. Montrose Shipbuilding Co. (1860), 22 D. 665 (ship on stocks—paid by instalments).

Spencer and Co. v. Dobie and Co. (1879), 7 Ret. 396 (ship on stocks—paid by instalments).

(5) *Effect given to Condition suspensive of Sale or of Passing the Property.*

i. *Suspensive of Sale.*

Marston v. Kerr's Trustee (1879), 6 Ret. 898 (cab hired by coach-builder to cab-hirer, with option of purchase).

Macdonald v. Western (1888), 15 Ret. 988 (jewellery on con-

III. EXCEPTIONS TO PRESUMPTION OF PROPERTY—*continued*.
tract of sale or return—owner preferred to possessor's creditors).
See COM. *ante*, p. 94.

ii. *Suspensive of Passing the Property.*

Cowan v. Spence (1824), 3 Sh. 42 (N.E. 28) (moveable machinery belonging to landlord of paper mill, and held by tenant on contract of hire-purchase—landlord preferred to tenant's creditors).

Wight v. Forman (1828), 7 Sh. 175 (distillery utensils belonging to landlord, leased to tenant under obligation by him to purchase—landlord preferred to tenant's creditors).

Anderson v. Ford (1844), 6 D. 1315 (felled timber partly taken by buyer's servants to harbour for shipment to buyer—property unpaid). See also II. (4).

Brandt v. Dickson (1876), 3 Ret. 375 (10 tons flax delivered to buyer—acceptance of bill held suspensive condition—seller preferred to buyer's creditors). See COM. *ante*, p. 102.

Duncanson v. Jefferis' Trustee (1881), 8 Ret. 563 (hotel furniture belonging to landlord leased to tenant—tenant under obligation to purchase—landlord preferred to tenant's creditors).

Hogarth v. Smart's Trustee (1882), 9 Ret. 964 (thrashing-mill erected by millwright on farm under verbal agreement that property not to pass till price paid—millwright preferred to farmer's creditors). See COM. *ante*, 101.

Murdoch and Co. Ltd. v. Greig (1889), 16 Ret. 396 (harmonium held on hire-purchase—fraudulently sent by hire-purchaser to sale-room and sold by public auction—owner preferred to *bonâ-fide* purchaser). But see now Factors Act 1889, Sect. 9; Sale of Goods Act, Sect. 25 (2), and COM. *ante*, pp. 83, 116.

See also

Girdwood and Co. v. Pollock, Gilmour, and Co. (1827), 5 Sh. 507 (N.E. 477) (question discussed but not decided whether delivery of part of a machine in course of manufacture transferred the property of that part).

III. EXCEPTIONS TO PRESUMPTION OF PROPERTY—*continued.*

- (6) *Effect denied to Possession, Transaction being Reduced or Reducible on ground of Insolvency or Bankruptcy.*

Vallance v. Scot (1531), Mor. 10597 (fraudulent transfer of possession).

M'Kay v. Forsyth (1758), Mor. 4944 (fish purchased by insolvent and handed to prior creditor, who was held *malâ fide*—seller preferred).

Wright v. Mitchell (1871), 9 Macp. 516 (completed delivery to buyer—re-delivery to seller reduced under bankruptcy Acts—buyer's creditors preferred). See also II. (4).

Stiven v. Scott and Simson (1871), 9 Macp. 923 (goods invoiced and partly delivered in security—general creditors preferred). See also II. (4).

Gourlay v. Hodge (1875), 2 Ret. 738 (grain purchased on credit and handed to prior creditor within sixty days of bankruptcy—buyer's general creditors preferred).

- (7) *Effect denied to Buyer's Possession, he being Insolvent or Fraudulent or holding Goods custodiæ causa.*

[NOTE.—The rule of presumptive fraud *intra triduum* was established by *Inglis v. Royal Bank (Cave's Case)* in 1736, and was acted upon till 1790, when it was set aside by the House of Lords in *Allan, Stewart, and Co. v. Stein's Creditors*, 3 Pat. App. 191. But a sale, fraudulent in itself, has always been reducible irrespective of the period of delivery of the goods.]

Inglis v. Royal Bank (1736), Mor. 4936 (grain delivered at various dates). See also II. (10) and COM. *ante*, p. 214.

Chrysties v. Fairholms (1748), Mor. 4896 (credit given upon faith of bill for price by buyer and third party—third party's signature forged).

Dunlop v. Crookshanks, etc. (1752), Mor. 4879 and 741 (fraudulent scheme for purchasing goods on the pretended joint credit of a third person and delivering them to a prior creditor in discharge of debt—seller preferred to prior creditor).

III. EXCEPTIONS TO PRESUMPTION OF PROPERTY—*continued*.

Forbes v. Mains and Co. (1752), Mor. 4937 (wines arrested on shipboard—sellers preferred, buyer having concealed from them her insolvent circumstances, and especially decree of *cessio bonorum*). See also IV. (3).

Robertson's Creditors v. Udnies and Patullo (1757), Mor. 4941 (goods fraudulently imported and sold—original seller preferred to the price).

Newall v. Mitchell (1765), Mor. 4944 (cattle pointed by creditors of buyer on day following purchase—held property had not passed to buyer—sellers preferred).

Wallace, Gardyn, and Co. v. Miller (1766), Mor. 8475 (linens while in custody of bleacher sold to him; buyer resiled from purchase on ground of insolvency—held not delivered).

Campbell, Robertson, and Co. v. Shepherd (1776), 2 Pat. App. 399 (scheme by insolvent who absconded from Scotland and fraudulently obtained credit in London—sellers preferred by House of Lords to arresting creditors of buyer).

Hills v. Buchanan (1785), Mor. 14200; Affd. H.L. (1786), 3 Pat. App. 47 (30 hhds. of tobacco, of which 8 delivered to insolvent buyer, but returned before actual bankruptcy—seller preferred to whole). See also II. (4).

Sandieman and Co. v. Kempf's Creditors (1786), Mor. 4947 (fraud giving rise to sale—buyer notour bankrupt forty-nine days after delivery of goods—seller preferred to buyer's creditors).

Love v. Kempf's Creditors (1786), Mor. 4948 (goods forwarded to buyer on receipt of fraudulent letter of guarantee—seller preferred to buyer's creditors).

Robertson and Aitken v. More and Co. (3rd July 1801), F.C., Mor. Sale, App. 3 (cargo of wheat partly delivered after notice of stoppage). See also IV. (3) and NOTE (d) *ante*, p. 225.

Collins v. Marquis's Creditors (23rd November 1804), F.C. [cargo of timber partly unloaded—remainder held not delivered. See also II. (10) and IV. (3)].

Drake v. M'Millan (1807), Hume 691 (timber landed by buyer and stored for benefit of all concerned—seller preferred). See also IV. (3).

Fotheringham v. Somerville and Co. (26th May 1809), F.C. (goods landed and stored in shipowner's cellar—arrested by buyer's

III. EXCEPTIONS TO PRESUMPTION OF PROPERTY—*continued.*

creditors and removed to public warehouse—sale annulled on ground of fraud). See also IV. (4).

Stein v. Hutchison (16th November 1810), F.C. (insolvent purchaser refused to accept delivery, but took goods into his warehouse *custodie causa*).

Gowans v. Phin (1813), Bell's *Com.* i. 244 (clerk of insolvent purchaser refused to accept delivery and stored goods in warehouse of third party).

Carnegie and Co. v. Hutchison (1815), Hume 704 (puncheon of rum delivered a few days before buyer's sequestration and bill for price not accepted). See Sale of Goods Act, Sect. 19 (3), *COM. ante*, p. 102.

Brown v. Watson (1816), Hume 709 (cattle and sheep bought by insolvent farmer and delivered in his absence—upon his return he re-delivered them to seller—seller preferred to buyer's creditors).

Schuermans and Sons v. Goldie (1828), 6 Sh. 1110 (cargo of cheese—buyer's insolvency announced, but concealed from sellers). See *COM. ante*, p. 215. .

Inglis v. Port Eglinton Spinning Co. (1842), 4 D. 478 (goods refused by insolvent buyer and sent to neutral custody, but afterwards received by buyer, held not delivered).

Watt v. Findlay and Hendrie (1846), 8 D. 529 (whisky sold and delivered—buyer concealed from seller that he was taking steps for sequestration). See *COM. ante*, p. 132.

Stoppel and Co. v. Stoddart (1850), 13 D. 61 (bill of lading indorsed by buyer to prior creditor, and indorsation reduced under bankruptcy Acts—goods effectually stopped *in transitu*). See also IV. (3).

Jowitt v. Stead (1860), 22 D. 1400 (wool refused as not according to sample, but received by buyer *custodie causa*).

Booker and Co. v. Milne (1870), 9 Macp. 314 (cargo landed from ship on to quay by buyer's servant, and small portion removed to buyer's warehouse—buyer then intimated rejection on ground of insolvency—whole held to be effectually rejected).

Birrell's Trustee v. Clark and Rowe (1874), Sh. Ct., Glasgow, Guthrie's Sel. Ca. i. 86 (coffees delivered after buyer had resolved to apply for sequestration).

III. EXCEPTIONS TO PRESUMPTION OF PROPERTY—*continued.*

Platnauer Bros. v. Tosh (1892), 8 Sh. Ct. Rep. 110 (watches, etc., delivered after buyers had resolved to stop payment).

(8) *Effect given to Mercantile Law Amendment Act 1856.*

M'Bain v. Wallace and Co. (1881), 8 Ret. 360; Affd. 8 Ret. H.L. 106 (ship on the stocks—paid by instalments). See COM. *ante*, p. 276.

Allan and Co.'s Trustee v. Gunn and Co. (1883), 10 Ret. 997 (nets allowed by buyer to remain with seller for ten months—delivery only taken after seller's sequestration). See also II. (8) and III (4), and COM., Sect. 61 *ante*, p. 278.

Scott v. Scott's Trustee (1889), 16 Ret. 504 (furniture bought from trustee for creditors, insolvent retaining possession—buyer preferred to trustee in subsequent sequestration). See also III. (2).

IV.—CIVIL POSSESSION THROUGH THIRD PARTIES.

(1) *Effect given to Document of Title or to Constructive Delivery.*

Main v. Maxwell (1710), Mor. 9124 (10 hhds. tobacco weighed over by seller to buyer's wife in public warehouse).

Buchanan and Cochran v. Swan (1764), Mor. 14208 (38 hhds. tobacco—assignment on back of "bill of loading").

Hastie and Jamieson v. Arthur (1770) H.L., 2 Pat. App. 251; Mor. 14209 (288 hhds. tobacco—"bill of loading" transmitted to buyers).

Bogle v. Dunmore and Co. (1787), Mor. 14216 (sugars—bill of lading transferred by indorsation).

Tod and Co. v. Rattray (1st February 1809), F.C. (spirits in bonded warehouse—delivery order addressed to revenue officer and intimated to him).

Spence v. Auchie, Ure, and Co. (1804), Mor. 14226; Revd. H.L. (1810), 5 Pat. App. 291 (spirits in bonded warehouse of third party—delivery order intimated to keeper of warehouse and entered in his books).

Laurie v. Black (1831), 10-Sh. 1 (grain in public store on which

IV. POSSESSION THROUGH THIRD PARTIES—*continued*.

storekeeper had made advances to owner—sale by intimated delivery order—buyer preferred to storekeeper).

M'Eachern v. Ewing and Co. (1824), 2 Sh. 724 (N.E. 603) (rum in bond—intimated delivery order).

Hastie and Co. v. Warden and Son's Trustee (1848), 11 D. 240; *Aff'd. H.L.* (1849), 21 Sc. Jur. 548 (delivery order for sugars indorsed by buyer to third party in security of advance—indorsee preferred to sellers).

Balfour v. Laing (1852), 24 Sc. Jur. 290; 1 Stuart 542 (cargo of flax—price paid by buyer on faith of arrival—foreign seller indorsed bill of lading in security of advance—indorsee preferred).

Hamilton v. Western Bank (1856), 19 D. 152 (brandy in bond—delivery order). See *COM. ante*, p. 276.

Morton and Co. v. Abercromby (1858), 20 D. 362 (bill of lading in buyer's name indorsed by buyer to third party). See also II. (10) and IV. (4).

Black v. Incorporation of Bakers (1867), 6 Macp. 136 (milling products vested by delivery order as produced). See also III. (4) and *COM. ante*, p. 91.

Vickers v. Hertz (1871), 9 Macp. H.L. 65 (iron warrant obtained by fraud and pledged—warrant held to be a document of title under Factors Act—pledgee entitled to retain for advance). See also II. (9).

Fleming v. Smith and Co. (1881), 8 Ret. 548 (sugars sold on credit—sub-sale by buyer on credit, and delivery order entered in original seller's stock-book—subsequent bankruptcy of first buyer—second buyer preferred to original seller). See *COM. ante*, p. 194.

Young v. Aktiebolaget Ofverums Bruk (1890), 18. Ret. 163 (iron shipped from Sweden for English buyer landed by mistake at Bo'ness and stored by buyer's agent—held not subject to diligence of seller's creditors). See also I.

West Lothian Oil Co. Ltd. v. Mair (1892), 20 Ret. 64 (empty barrels sold by company to director and separately enclosed in a locked fence in company's yard, the key of which was handed to buyer—held effectually delivered to him—question of sale or security). See also I. and *COM. ante*, p. 279.

IV. POSSESSION THROUGH THIRD PARTIES—*continued.**See also*

Adamson, Howie, and Co. v. Guild (1868), 6 Macp. 347 (sugars—bill of lading—alleged stoppage *in transitu*—form of issues).

Connal and Co. v. Loder (1868), 6 Macp. 1095 (intimated transfer of iron warrant).

(2) *Effect denied to Document of Title or to Constructive Delivery.*

Young v. Stein's Creditors (1789), Mor. 14218 (spirits shipped but driven back to port by contrary winds—bill of lading indorsed and transmitted to buyer—seller preferred to buyer's creditors).

Campbell, Ruthven, and Co. v. Brown (1803), Bell's Com. i. 209 (rum in bond—delivery orders—sellers preferred).

Robertson, Harvey, and Co. v. Adam's Creditors (1803), Bell's Com. i. 210 (rum in bond—intimated delivery order—sellers preferred).

Arnots v. Boyter (24th November 1803), F.C., Mor. 14204 (bill of lading sent by seller to his own agent and delivery refused till price secured—seller preferred). See COM. *ante*, p. 102.

Auld v. Hall and Co. (12th June 1811), F.C. (wine in bond—unintimated delivery orders—sellers preferred).

Eadie v. Mackinlay (7th February 1815), F.C. (raw hides in tanyard—sale insufficiently intimated—creditor of seller preferred).

Taylor v. Jack (1821), 1 Sh. 133 (N.E. 139) (taking hold of horse's ears not constructive delivery). See also II (4).

Levitt v. Cleasby (1823), 2 Sh. 184 (N.E. 163) (oils in hands of third party—unintimated authority to obtain possession not equal to possession).

McEwen and Co. v. Smiths (1847), 9 D. 434; Affd. H.L. (1849), 6 Bell's App. 340 (sugars in bond—unintimated delivery order). See COM. *ante*, p. 206.

Melrose and Co. v. Hastie and Co. (1850), 12 D. 665; (1851), 13 D. 880 and 14 D. 268; (1854), H.L. 1 Macp. 698 (sugars in bond—unintimated delivery order. House of Lords decided on technical specialty).

IV. POSSESSION THROUGH THIRD PARTIES—*continued*.

Smith v. Allan and Poynter (1859), 22 D. 208 (spirits in bond—purchaser's name on casks).

Mackinnon v. Max Nansen and Co. (1868), 6 Macp. 974 (copper rollers in hands of third party, who acknowledged that he held for buyer, but under certain conditions in favour of seller—held no transfer of property).

Hamilton v. Dixon (1873), 1 Ret. 72 (obligation signed by clerk of ironmasters to deliver iron generically described, held not binding on ironmasters in a question with *bona-fide* indorsee).

Seath and Co. v. Moore (1884), 12 Ret. 260; Affd. (1886), 13 Ret. H.L. 57 (ship-machinery in builder's yard). See also II (4) and COM. *ante*, p. 90.

Distillers' Co. Ltd. v. Russell's Trustee (1889), 16 Ret. 479 (whisky in seller's bonded warehouse—series of delivery orders by sub-purchasers intimated to sellers and acknowledged by them—five years afterwards claim of sub-purchasers for delivery resisted by sellers although price paid, on ground that never delivered and liable for general balance due by original purchaser). See NOTE (e), Sect. 18 *ante*, p. 88.

(3) *Effect given to Stoppage in transitu*.

[NOTE.—In stoppage *in transitu* the civil possession (through the carrier) is not that of the seller but of the buyer. The goods are delivered, otherwise the seller's remedy would be retention, not stoppage. A misapprehension on this point led to many cases between 1790 and 1849 being decided by the Court of Session as cases of stoppage *in transitu*, which were really cases of retention. This was corrected by the House of Lords in *M'Ewen v. Smiths*, IV. (2) *ante*. The error is referred to by Lord Justice-Clerk Inglis in *Black v. Incorporation of Bakers* (1867), 6 Macp. 136 at p. 140. See COM. *ante*, p. 206.

Allan, Stewart, and Co. v. Stein's Creditors (1788), Mor. 4949; Revd. H.L. (1790), *sub nom. Jaffrey, etc. v. Allan, Stewart, and Co.*, 3 Pat. App. 191 (cargo of grain—bill of lading indorsed to buyer, but goods alleged to have been stopped *in transitu*. House of Lords allowed proof on this point). See also II. (10) and COM. *ante*, pp. 204, 214.

IV. POSSESSION THROUGH THIRD PARTIES—*continued*.

Robertson and Aitken v. More and Co. (3rd July 1801), F.C., Mor. Sale, App. 3 (cargo of wheat partly delivered—stoppage effectual as to remainder). See also III. (7) and NOTE (d) *ante*, p. 225.

Collins v. Marquis's Creditors (1804), Mor. 14223 (cargo of timber partly unloaded—remainder effectually stopped). See also II. (10) and III. (7).

Baxter v. Pearson (1807), Hume 688 (wheat on board ship hired by buyer—stoppage effectual).

Drake v. M'Millan (1807), Hume 691 (timber landed from vessel and stored by buyer's orders for benefit of all concerned—stoppage while in store effectual). See also III. (7).

Neish v. Trompousky and Co. (1807), Hume 693 (hemp landed and lodged by shipmaster in public warehouse—stoppage by seller preferred to prior arrestment by creditor of buyer).

Mitchell v. Gowans and Phin (12th January 1813), F.C. (delivery refused by buyer's clerk—goods stored—transit not ended).

Dunlop v. Scott and Co. (22nd February 1814), F.C. (goods to lie till called for—warehoused by carrier—transit not ended). See NOTE (m) *ante*, p. 212.

Black v. Cassels, 1828, 6 Sh. 894 (whisky by arrangement with buyer stored three months in carrier's warehouse—stoppage effectual. But see now Sale of Goods Act, Sect. 45 (3), and COM. *ante*, p. 211).

Stoppel and Co. v. Stoddart (1850), 13 D. 61 (bill of lading indorsed by buyer, but indorsation reduced under bankruptcy Acts—seller's proceedings held an effectual stoppage *in transitu*). See also III. (7).

M'Leod and Co. v. Harrison (1880), 8 Ret. 227 (goods purchased for transmission to buyers at their branch establishment in Russia—shipped in name of buyer but stopped in the hands of an intermediate railway company—stoppage effectual).

See also

Forbes v. Mains and Co. (1752), Mor. 4937 (cargo of wine arrested in hands of shipmaster by creditor of buyer—sellers compeared in forthcoming, and were preferred on the ground of buyer's fraud). See also III. (7).

IV. POSSESSION THROUGH THIRD PARTIES—*continued*.(4) *Effect denied to Stoppage, or alleged Stoppage in transitu*.

Prince v. Pallat (1680), Mor. 4932 (wines from Bordeaux—stopped at Scottish port before delivery—buyer's assignee preferred). See also II. (10) and Com. *ante*, pp. 159, 204.

Fotheringham v. Somerville and Co. (26th May 1809), F.C. (goods landed and stored in shipowner's cellar—arrested by creditors of buyer and removed to public warehouse before seller appeared—sale annulled on ground of fraud, but alleged stoppage ineffectual). See also III. (7).

Strachan v. Knox and Co.'s Trustee (21st January 1817), F.C. (wines *ex ship*—bonded in name of agent for buyer). See also II. (10).

Morton and Co. v. Abercromby (1858), 20 D. 362 (goods purchased and shipped in buyer's name for Australian market—held delivery complete and stoppage *in transitu* not applicable). See also II. (10) and IV. (1).

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III.

NOTES ON THE ENGLISH DOCTRINE OF CONSIDERATION AND THE HISTORY OF THE STATUTE OF FRAUDS.¹

I.—THE DOCTRINE OF CONSIDERATION.

Consideration applies to what are known in English law as "simple contracts," but these form a very wide class, embracing almost all contracts, whether written or verbal, except such as are constituted by a formal deed under seal. It is said to consist "either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."² This definition, however, is of little value apart from more detailed characteristics, which may be stated as follows:—

1. *Adequacy of value is in no degree essential.*—It was early settled that, no matter how trifling the value, be it a sheet of paper, a stick of sealing-wax, or a grain of corn, it is sufficient to give efficacy to an obligation of any value or amount. "When a thing is to be done by the plaintiff, be it ever so small, this is a sufficient consideration to ground an action."³

2. *No merely moral obligation has effect as consideration.*—This was fixed law as early as the end of the sixteenth century, though there are indications that earlier in that century the line between a moral and a legal obligation was not definitely marked.⁴ As

¹ These notes are extracted from two lectures delivered by the present author in Glasgow in October 1890 and October 1892 respectively.

² *Currie v. Misa* (1875), L.R. 10 Ex. 158 at p. 162.

³ *Sturlyn v. Albany* (1586), 1 Croke 67.

⁴ Year-Book 20, Henry VII. (1505), fol. 11; Doctor and Student (1528), Dial. 2 ch. 24; *Sharington v. Strotton* (1566), 1 Plow. 298.

DOCTRINE
OF CON-
SIDERATION.

now settled the law holds that, although a person may be bound by the strongest natural ties to provide for the support of others, no engagement short of a covenant under seal will transform the moral obligation into a legal one.¹

3. *Consideration may be present or future but it must not be past.*—

A man may believe himself to be under obligation on account of past benefits received by him, but such sentiments of gratitude or friendship do not form a consideration in the eye of the law.² Thus an agreement to pay £5 to the plaintiff on his marriage in consideration that the plaintiff *had delivered* to the defendant twenty sheep, was held invalid as devoid of consideration.³ So also a promise to pay a certain amount in consideration that the plaintiff *had on some former occasion* voluntarily paid a similar amount to the defendant,⁴ or a warranty of a horse in consideration that the plaintiff *had bought* it of the defendant at a certain price.⁵ For the same reason a promissory note given as remuneration for past services rendered without agreement for reward cannot be enforced.⁶ In such cases if the promise founded on can be thrown back to the alleged consideration it will be valid but not otherwise.⁷

4. *It is no consideration for a promise that the person receiving it has given a counter promise to do something which he is already under legal obligation to perform.*—Thus an agreement to give a debtor time in consideration of his paying the interest already stipulated is inoperative,⁸ but if additional security is offered it validates an agreement to accept even less interest.

It was established by the case of *Pinnel*⁹ in 1602, and affirmed by the House of Lords so recently as 1884,¹⁰ that if the day of payment of a debt *has arrived*, an agreement by the creditor to accept *at the proper place of payment* a smaller sum of money in full of the whole debt, is not binding, but if instead of money he agrees to accept at the place of payment a trifling article

¹ *Bret v. J. S. and Wife* (1800), 1 Croke 756.

² *Eastwood v. Kenyon* (1840), 11 Ad. and El. 438.

³ *Jeremy v. Goochman* (1596), 1 Croke 442.

⁴ *Doggett v. Powell* (1802), Moore 643.

⁵ *Roscorla v. Thomas* (1842), 8 Q.B. 234.

⁶ *Hulse v. Hulse* (1856), 17 C.B. 711.

⁷ *Thornton v. Jenyns* (1840), 1 M. & G. 166.

⁸ *Orme v. Galloway* (1854), 9 Ex. 544.

⁹ 3 Coke 238. ¹⁰ *Foakes v. Beer* (1884), 9 App. Ca. 605.

in satisfaction, or if he accepts a smaller sum of money *at another place*, it will be binding. If the day of payment *has not arrived* an agreement to accept part for the whole will be binding no matter where or how it is paid.¹

By the law of Scotland consideration is not essential to contract. Adequacy of value may be an important element in questions of reduction on the ground of fraud or error, but, *per se*, consideration, whether nominal or valuable, is not taken into account.² The Scottish law recognises the validity of unilateral obligations or promises where there is no counterpart or corresponding obligation on the part of the recipient. Stair quotes the Bible, the civil law and the canon law, to show that "promises or naked pactions are morally obligatory by the law of nature," and that "there is nothing so congruous to human trust as to perform what is agreed among men."³ Erskine says, "The obvious reason why all verbal agreements and promises must be obligatory in every nation where no special exception is made by positive institution, is that by a common rule of law every agreement in a lawful matter, though constituted only verbally, induces a full or proper obligation."⁴

II.—THE HISTORY OF THE STATUTE OF FRAUDS.

(29 Car. II. c. 3.)

The Statute of Frauds was passed in 1677 in the 29th year of the reign of Charles II. It is a purely English statute, but nearly twenty years later its principal provisions were enacted for Ireland.⁵ It is in force in most of the British colonies and generally throughout the United States, but no other country has any similar statutory provision. It is entitled "An Act for

¹ "According to the English common law a creditor may accept anything in satisfaction of his debt except a less amount of money. He may take a horse, or a canary, or a tomtit if he chooses, and that is *accord and satisfaction*; but by a most extraordinary peculiarity of the English common law the creditor cannot take nineteen shillings and sixpence in the pound; if he does so it is *nudum pactum* (i.e. an agreement without any binding force). Therefore, although the creditor may take a canary, yet if the debtor did not give him a canary together with his nineteen shillings and sixpence, there was no accord and satisfaction. This is one of the mysteries of English common law."—Sir George Jessel.

² *Law v. Humphrey* (1874), 3 Ret. 1192.

³ *Stair's Inst.* i. 10. 10.

⁵ Irish statutes, 1695, 7 Wm. III. c. 12.

⁴ *Ersk. Inst.* iii. 2. 1.

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FRAUDS.

the Prevention of Frauds and Perjuries," and, speaking generally, this object is sought to be accomplished by rendering writing essential in wills and in contracts affecting real estate, contracts of guarantee, and contracts for the sale of goods of the value of £10 or upwards.

Until the publication in 1884 of the ninth Report of the Royal Commission on Historical Manuscripts very little was known of the authorship of the statute or of the circumstances under which it was enacted. But conjectures were early set afloat. Roger North in the life of his brother, Chief-Justice Francis North (afterwards Lord-Keeper Guilford), tells us that the Chief-Justice had a great hand in the framing of this statute, but that "at that time the Lord Chief-Justice Hales had the pre-eminence, and was chief in the fixing that law."¹ So far as the biographer's brother is concerned, the discoveries of the last decade have proved that Roger North was nearer the truth than he had any reasonable ground to suppose, for, in accordance with his habit, the suggestion was hazarded upon a very slender basis of fact. The statement as to Chief-Justice Hale had no foundation whatever, yet it illustrates the tenacity of error that the suggestion of Roger North formed for two centuries the leading idea connected with the authorship of the Statute of Frauds.

In the case of *Windham v. Chetwynd*,² in 1757, Lord Mansfield, in the course of the argument, expressed doubts "of that generally received opinion that Lord Hale drew the statute," he having died in the year preceding its passing into law.³ In

¹ Ed. 1742, i. 408; ed. 1826, i. 223. The whole passage is as follows:—"He had a great hand in the Statute of Frauds and Perjuries, of which the Lord Nottingham said that every line was worth a subsidy. But at that time the Lord Chief-Justice Hales had the pre-eminence, and was chief in the fixing that law: although the urging part lay upon him" (i.e. upon North, C. J.), "and I have reason to think it had the first spring from his lordship's motion. For I find in some notes of his, and hints of amendments in the law, every one of those points which were there taken care of; and divers other matters which he set his mark upon, have since been regulated by Acts of Parliament express."

² Burrow, p. 414; W. Blackstone, p. 95.

³ The draft, however, was substantially in the form of the Act nearly two years before the death of Sir Matthew Hale, which took place 25th December 1676. Lord Mansfield's words, as reported, are as follows:—"It has been said that this Act of 29 Car. II. c. 3, was drawn by Lord Chief-Justice Hale, but this is scarcely probable. It was not passed till after his death, and it was

delivering judgment in the same case, Lord Mansfield said, "I can never conceive, for the reasons I formerly mentioned, that this statute was drawn by Lord Hale, any farther than by perhaps leaving some loose notes behind him, which were afterwards unskilfully digested."¹ Lord Mansfield seems to have based his opinion upon internal evidence. He had not a high opinion of the statute, and refused to associate an eminent name with its construction.² Nearly fifty years later, in the leading case of *Wain v. Warlters*³ (1804), Lord Ellenborough inverted this process of reasoning, and argued that, because Lord Hale drafted the statute, every word should have its proper legal effect. "Lord Hale," he says, "one of the greatest judges who ever sat in Westminster Hall, was as competent to express, as he was able to conceive, the provisions best calculated for carrying into effect the purposes of that law."⁴ This case is remarkable as establishing not only that a guarantee must be in writing and must have "consideration" in the English sense, but, further, that this "consideration" must be expressed in the writing itself. Apart from any restrictions upon contract due to the operation of the Statute of Frauds, it enforced the Doctrine of Consideration in a form intolerable to commerce, and led to the provision of the English Mercantile Law Amendment Act of 1856, by which partial relief was given.⁵ Lord Ellenborough's decision,

brought in in the common way; and not upon any reference to the judges" (1 Burr. 419). This last statement we now know to be incorrect. The bill was referred to the judges at a very early stage, and was entirely re-drafted by Chief-Justice North.

¹ W. Blackstone, pp. 98, 99.

² Lord Mansfield goes on to say:—"There have perpetual doubts arisen upon every clause of this statute, not only among the unlearned, for whom it ought to have been calculated, but even among the learned also. . . . In theory it seemed a strong guard [against fraud]; in practice it may be some guard. But I believe more fair wills have been destroyed for want of observing its restrictions than fraudulent wills obstructed by its caution. In all my experience at the court of delegates I never knew a fraudulent will but what was legally attested; and I have heard the same from many learned civilians. Courts of justice ought, therefore, to lean rather against than in support of any too rigid formalities."—W. Blackstone, pp. 99, 100.

³ 5 East 10.

⁴ 5 East at p. 16.

⁵ 19 & 20 Vict. c. 97, Sect. 3. The relieving section is as follows:—"No special promise to be made by any person after the passing of this Act to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom

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so far as founded on Lord Hale's authority, was due to misapprehension, and forms a curious instance of the random conjecture of a biographer influencing prejudicially the commerce of a great commercial nation for more than half a century.

No further light was thrown upon the authorship of the Statute of Frauds till 1823, when Mr. Swanston obtained from Lord Eldon the MSS. of Lord Nottingham. From this material he reported, among other old cases, that of *Ash v. Abdy*,¹ decided by Lord Nottingham in 1678—the year immediately succeeding the passing of the statute. In giving judgment in that case Lord Nottingham said regarding the Statute of Frauds that “he had some reason for knowing the meaning of this law ; for it had its first rise from me who brought in the bill into the Lords’ House, though it afterwards received some additions and improvements from the judges and the civilians.” None of the previous conjectures had pointed to Lord Nottingham. Roger North was a contemporary, yet he suggests Sir Matthew Hale in conjunction with Chief-Justice North as the author, and only mentions Nottingham to report a saying, now intimately associated with his name, as to every line of the statute being worth a subsidy.² Lord Mansfield was married to Nottingham’s granddaughter,³ yet it is evident from his judgment in *Windham’s* case that he was unable to originate any suggestion in regard to the authorship. But after 1823 the question was deemed conclusively settled. Lord Campbell, in his life of Nottingham, published in 1845, tells us that “it is now ascertained that Lord Nottingham was the author of the most important and most beneficial piece of juridical legislation of which we can boast—the famous Statute of Frauds—the glory of which was long

such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.” It must be kept in view that “consideration” is still necessary to the validity of an English contract of guarantee, although it does not now require to be stated in the writing itself.

¹ 3 Swanston 664.

² “If Lord Nottingham was justified, while speaking with parental pride of the principle of the measure, in declaring that it was an Act every line of which was worth a subsidy, the present generation, who can contemplate the almost endless litigation which its ambiguous language has caused, may add, with more truth if not with more sincerity, that every line of it has cost a subsidy.”—Taylor on *Evidence*, 8th ed. p. 853.

³ Campbell’s *Lives of the Chief-Justices*, ii. 345.

divided between Lord Hale and Sir Leoline Jenkins.”¹ He further suggests that these two may have been among the “judges and civilians” who, according to Nottingham, assisted in making improvements.

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The year 1884 marks the final stage in the elucidation of the history of the statute. The researches among the papers of the House of Lords, made by authority of the Historical Manuscripts Commission, resulted in the discovery of the original draft of the statute, the text of which is now to be found in the Commissioners’ ninth Report, with memoranda as to the various amendments, and notes as to handwriting.² From this Report we also gather a fairly complete record of the progress of the measure. Its first appearance was in the House of Lords on 16th February 1673 (O.S.), when it reached the Committee stage, but dropped with the session. The Commissioners tell us that “the draft is apparently in the careful handwriting of Lord-Keeper Finch” (afterwards Earl of Nottingham), and that “the corrections upon it are undoubtedly in his hand.”³ The draft, recopied, was again introduced on 14th April 1675, which, allowing for the difference between old and new style, was fourteen months after its original introduction.⁴ After very material alterations in Committee it passed on this occasion through the House of Lords, but on being sent to the Commons further progress was again barred by the close of the session. The bill, as now altered, was introduced into the House of Lords for the third time in October 1675, but was dropped in Committee. After an interval of fourteen months it was brought into the House for the fourth time in February 1676 (O.S.), and in the course of two months thereafter it passed through both Houses without material alteration, receiving the Royal Assent on 16th April 1677.⁵

On the question of authorship it is important to notice the proceedings in Committee on the first occasion on which the bill

¹ Campbell’s *Lives of the Chancellors*, iii. 418.

² Ninth Report (1884), part ii. pp. 45, 48, 49, 66, and 69.

³ Ninth Report, part ii. p. 45.

⁴ Before 1752 the legal year commenced on 25th March, but in that year and afterwards it was changed by statute to 1st January (24 Geo. II. c. 23, Sect. 1). Under the old style, April was in a different year from the February which immediately preceded it.

⁵ Some text books give the date as 1676, overlooking the fact that a new year had been entered upon on 25th March preceding.

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passed through the House of Lords. The preamble of Nottingham's draft having been agreed to, the Committee desired the attendance of the judges, whom they wished to consult as to the nature of the writing to be required, and the precise effect of certain technical expressions. It was at this stage that Chief-Justice North intervened, and became practically responsible for the whole text of the measure. Taking the statute as passed we find that Nottingham's draft did not extend beyond the 10th section, and that the 4th section, which is now the only one of importance in this part of the Act, was almost entirely re-drafted by North. The Chief-Justice seems also to have framed Sects. 11 to 18, and Sects. 24 and 25. The substance of Sects. 19 to 23, regarding nuncupative wills, was suggested by Sir Leoline Jenkins, judge of the Prerogative Court, but the articles presented by Sir Leoline were ordered "to be drawn into enacting clauses by the judges," and this also was done by the Chief-Justice.¹ It was in the shape in which the bill left the Committee on this occasion that it ultimately passed into law.

Lord Nottingham's draft may be contrasted with the 4th and 17th² sections of the statute as follows :—

DRAFT.

"And be it further enacted by the authority aforesaid that, in all actions upon the case, actions of debt, or other personal actions, which from and after the day of shall be commenced upon any assumpsit, promise, contract, or agreement made or supposed to be made by parole, and whereof no memorandum, note, or memorial in writing shall be taken by the direction of the parties thereunto, no greater damages shall at any time be recovered than the sum of

STATUTE.

Sect. 4.—And be it further enacted by the authority aforesaid that from and after the said four and twentieth day of June (1677) no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage or upon any contract or

¹ Ninth Report, part ii. p. 49.

² In accepting the aid of the revised edition of the statutes, it must be kept in view that the sections of the Statute of Frauds are now differently numbered. Sect. 13, as it appears in the Statutes at Large (1763), was a mere preamble to the following section, and for this reason it was incorporated with that section in the revised edition of 1870. The numbers of all the sections following the 12th are therefore changed. The 17th section, which was of special importance as affecting the sale of goods, is officially cited as the 16th, and as such it was repealed by the Sale of Goods Act, Sect. 60, and relative Schedule *ante*, p. 290.

DRAFT—continued.

any law or usage to the contrary notwithstanding. Provided that this Act shall not extend to such actions or suits, which shall or may be grounded upon contracts or agreements for wares sold, or money lent, or upon any quantum meruit, or any other assumpsits, or promises which are created by the construction or operation of law: But that all and every such actions shall and may be sued and prosecuted in such manner as the same might have been before the making of this Act, anything hereinbefore to the contrary notwithstanding."—(*Ninth Report of Hist. Manu. Com.*, part ii. p. 48.)

STATUTE—continued.

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sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

*Sect. 17.*¹—And be it further enacted by the authority aforesaid that from and after the said four and twentieth day of June (1677) no contract for the sale of any goods, wares, or merchandises for the price of ten pounds sterling or upwards shall be allowed to be good except the buyer shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorised.

It thus appears that Chief-Justice North (Lord Guilford) is responsible for the drafting of the Statute of Frauds, and that, beyond the original conception of rendering writing a legal essential in particular circumstances, the share of Lord Nottingham in the work was comparatively small. Nottingham's original proposal seems to have been to limit to a certain specified amount the damages to be recovered for breach of a "simple contract" (*i.e.* a contract not established by deed under seal) unless a written memorandum of the bargain had been previously agreed upon between the parties.² He did not suggest signature as a requirement, his only object being to secure that each party was dealing with the same subject-matter. The *fact* of the agreement might still be proved parole, but it was supposed to take away any temptation to perjury if the *terms* of the bargain were put

¹ See footnote previous page.

² Simple contracts, even where writing is required for their proof, are still called *verbal* contracts, as distinguished from contracts of record, and contracts by deed under seal.

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into definite written language. It is further to be observed that Lord Nottingham's proposal expressly excluded the contract of sale, which was still to remain as free as before. But the suggestions of Chief-Justice North, which are now the law of England,¹ were very different in their character. The Act, as framed by him, provides that the memorandum must be signed, and, so far from sale being excluded from the operation of the statute, it is made the special subject of the 17th section, which has been the cause of enormous litigation, and is now almost universally condemned. Without venturing to assert that Lord Nottingham's proposal was in every respect satisfactory, it may at least be claimed for its author that he embodied a philosophical conception without the serious blemish which has caused the 17th section² of the statute to be practically ignored in every large commercial centre.³

The foregoing facts clear away the mists so long surrounding the history and authorship of the Statute of Frauds. From first to last there is not the slightest trace of the draftsmanship, or even of the influence, of Lord Hale, and it may be suggested to the text writers who still associate his name with its construction that in future editions such passages should be revised.⁴

¹ Although the 17th (16th) section of the Statute of Frauds is now repealed by the Sale of Goods Act, its substance is re-enacted by Sect. 4 of that Act. See *ante*, p. 27.

² Now Sect. 4 of the Sale of Goods Act.

³ The result is in accordance with the character of the respective draftsmen. Lord Campbell's estimate was formed without reference to the Statute of Frauds, and without knowing anything of Chief-Justice North's share in this particular work, yet he thus describes the general character of the two men. Of Chief-Justice North (Lord-Keeper Guilford) he says: "He was sharp and shrewd, but of no imagination, of no depth, of no grasp of intellect, any more than generosity of sentiment. Cunning, industry, and opportunity may make such a man at any time. A Nottingham does not arise above once in a century. Guilford had as much law as he could contain, but he was incapable of taking an enlarged and commanding view of any subject."—*Lives of the Chancellors*, iii. 489.

⁴ See, for example, the following:—"STATUTE OF FRAUDS.—This famous statute is said to have been framed by Sir Matthew Hale, Lord-Keeper Guilford, and Sir Leoline Jenkins, an eminent civilian. Lord Nottingham used to say of it that every line was worth a subsidy, and it has been said that at all events the explanation of every line has cost a subsidy, no statute having been the subject of so much litigation."—Wharton's *Law Lexicon*, 9th ed. 1892. "This celebrated statute we owe to the great lawyer, but in different statesman, Lord Nottingham, who appears to have been assisted in framing it by Sir Leoline Jenkins and Lord Hale."—Taylor on *Evidence*, 8th ed. (1885), p. 853.

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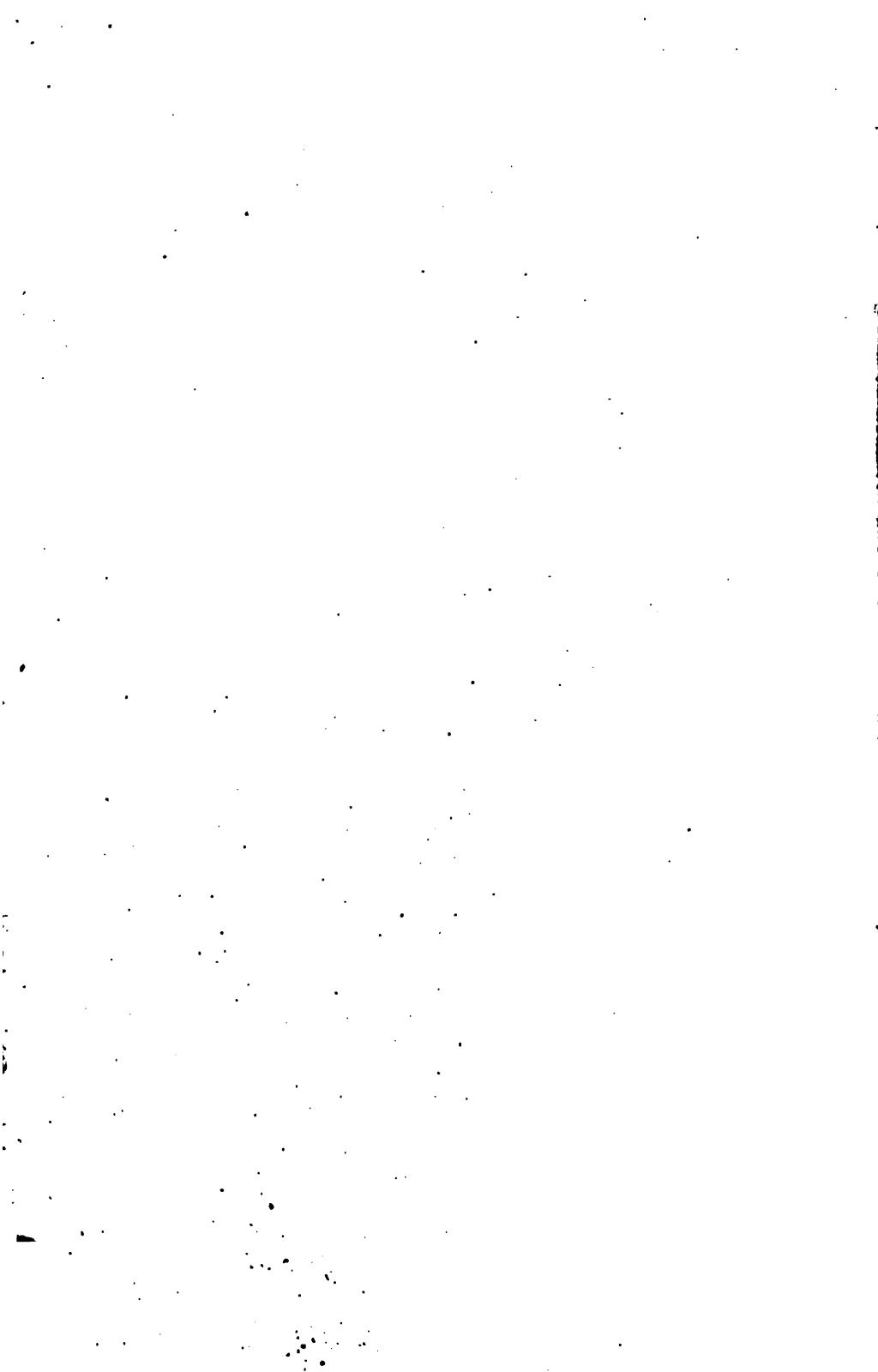
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